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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 172.

MINNESOTA STATE LIBRARY

THAD A. BRYANT, TRUSTEE IN THE MATTER OF E. M. NEWTON & CO., BANKRUPTS, APPELLANT,

vs.

SWOFFORD BROS. DRY GOODS CO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED SEPTEMBER 8, 1908.

(20,842.)

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SUPREME COURT OF THE UNITED STATES.

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No. 439.

THAD A. BRYANT, TRUSTEE IN THE MATTER OF E. M. NEWTON & CO., BANKRUPTS, APPELLANT,

vs.

SWOFFORD BROS. DRY GOODS CO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1907, of said Court, begun and held at the United States Court House in the City of St. Paul, Minnesota, on the first Monday in May, to-wit: the sixth day of May, A. D. 1907, before the Honorable Walter H. Sanborn, Honorable William C. Hook and Honorable Elmer B. Adams, Circuit Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit
Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the fourth day of June, A. D. 1906, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the Western District of Arkansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Swofford Brothers Dry Goods Company, a Creditor and Intervener in the Matter of E. M. Newton & Co., Bankrupts, was Appellant, and Thad A. Bryant, Trustee in the Matter of E. M. Newton & Co., Bankrupts, was Appellee, which said transcript of record is in the words and figures following, to-wit:

United States District Court.
1 Texarkana Division,
Western District of Arkansas.

Pleas before Hon. John H. Rogers, Judge of the United States District Court for the Texarkana Division of the Western District of Arkansas on the 14th day of May, A. D. 1906.

In the matter of the estate of E. M. Newton & Co., in Bankruptcy, Bankrupts.

To the Honorable John H. Rogers, Judge of the District Court of the United States District Court, for the Western District of Arkansas:

The Petition of E. M. Newton & Co. respectfully represents:: That your petitioners, Ernest M. Newton and John F. Newton, have been partners under the firm name of E. M. Newton & Co., having their principal place of business at New Lewisville, in the county of Lafayette and District and State aforesaid for the greater portion of six months next preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by their oath, contains a full statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements as are required by the provisions of said acts.

That the schedule, hereto annexed, marked B, verified by their oath, contains an accurate inventory of all the property, real and personal, of said partners and such further statements concerning said property as are required by the provisions of said acts.

And said E. M. Newton further further states that the schedule, hereto annexed, marked C, verified by his oath, contains a true and full statement of all his individual debts, and as far as possible, the names and residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule, hereto annexed, marked D, and verified by his affidavit, contains an accurate inventory of all his individual property, real and personal, and such further statements
2

concerning said property as are required by the provisions of said act.

And said John F. Newton further states that the schedule, hereto annexed marked E, verified by his affidavit, contains a true and full statement of all his individuals debts, and as far as possible, the names and places of residence of his creditors and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule, hereto annexed and marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm be adjudged, by a decree of this court, to be bankrupts within the purview of said acts.

E. M. NEWTON,
J. F. NEWTON.

SEARCY & PARKS,
Attorneys.

Ernest M. Newton and John F. Newton, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are ture to the best of their knowledge and information and belief.

E. M. NEWTON,
J. F. NEWTON.

Subscribed and sworn to before me this 3rd day of July, 1905.

[Seal] GEO. WEBBER,
Notary Public, Miller County, Arkansas.

My commission expires Jan. 12, 1907.

Endorsed: Filed, the 3rd day of July, 1905, at 5:30 P. M., John M. Somervell, Clerk.
Deposit fee, $ .60.

SEARCY & PARKS,
Attys.

3 Schedule A. Statement of all Debts of Bankrupts.

Claims which have priority.

Taxes and debts due and owing to the U. S..... None.
Taxes due and owing to the State of Ark..... None.

Or to any county, district or municipality of Ark..... None.
Wages due workmen, clerks or servants to an amount not exceeding $300.00 each, earned within three months before filing the petition:

Miss M. Turrentine,
Lewisville, Ark., Wages $28.74
Fay Searcy,
Lewisville, Ark. $50.00
S. W. Mulkey,
Lewisville, Ark. $24.38
Miss M. Todd,
Texarkana, Ark. $50.00
Other debts having priority by lay ..... None.

Total $153.12

E. M. NEWTON,
J. F. NEWTON,
Petitioners.

4 Schedule A. (2).

Creditors holding securities.

State National Bank, Texarkana, Ark.....$ 1,912.74
$750.00 secured by person endorsement of J. B. Maryman, and $1,162.74 secured by customers notes amounting to $1,548.15.

Merchants' and Farmers' Bank, New Lewisville, Ark. ....$ 4,669.85

Secured customers notes and accounts to the extent of ....$ 4,1,169.85
and $3,500.00 personal endorsements of N. D. Harrell, W. H. Baker for $1,000.00 and R. L. Searcy, B. P. Wheat and J. B. Maryman for $2,500.00.

Swefford Bros Dry Goods Co., Kansas City, Mo....$13,310.56
and interest.

The above indebtedness arose and is secured as follows: On the 20th day of July, 1904, we entered into a contract with above creditor, true copy of which is hereto attached, marked Exhibit A, and made a part of this schedule. Under the terms of said contract Swofford Bros. Dry Goods Co. at various days and dates sold and delived to us merchandise in the aggre-

gate cost and value of about $15,400.00 Dollars, and at various days and dates since the making of said contract we have paid to said Swofford Bros. Dry Goods Co. amounts aggregating about ..... Dollars, leaving unpaid the amount above named.

On the 30th day of June, 1905, under and pursuant to said contract we returned to said Swofford Bros a portion of the merchandise so purchased aggregating at cost price the sum of $5,337.21, and on the same day in pursuance of said contract we assigned, transferred and delivered to said
5 Swofford Bros. Dry Goods Company certain notes aggregating the sum of $1,684.32, and certain accounts aggregating $8,277.04, due and payable to us for goods of the said Swofford Bros. Dry Goods Company, urchased under said contract and by us sold and delivered to our customers, which said merchandise, notes and accounts are now in the possession of and under the control of said Swofford Bros. Dry Goods Co., said goods being set apart in our store by said Swofford Bros. Dry Goods Co. on East Broad Street, Texarkana, Arkansas.

EXHIBIT "A."

6 Know All Men By These Presents: That Mr. E. M. Newton & Co., of New Lewisville, Lafayette County, Arkansaw, a co-partnership composed of E. M. Newton and J. F. Newton, party of the first part, has this day purchased from Swofford Bros. Dry Goods Co., and said Swofford Bros. Dry Goods Co., party of the second part, has sold to said E. M. Newton & Co. certain goods upon the following expressed conditions:

1. Said goods shall be selected by said first party from sample or from stock of said second party at Kansas City, Missouri, and same shall be shipped to said first party upon their request to New Lewisville, Arkansaw, from which place they shall not be removed without the written consent of said second party save and except, that said first party shall have the right to sell said goods in the ordinary course of business but not otherwise.

2. Said second party shall prepare at time of shipment full and complete invoices of the goods so sold and selected and shall deliver copies of said invoices by mail or otherwise to said first party. Such invoices shall consist of itemized list of the articles so sold and shipped with the price and value

of each article, and shall show also the credit terms upon which the same are sold and the rate of discount, if any, which is to be allowed upon payment of the purchase price in cash upon delivery or at an earlier date than that specified in said credit terms.

3. The title to and right to immediate possession of all the goods so sold and shipped by said Swofford Bros. Dry Goods Co. and of the proceeds derived from the sale of the same by the first party, whether in cash or note or book account, shall be vested and remain in said Swofford Bros. Dry Goods Co. until the full purchase price and the agreed value of the same shall be paid by said E. M. Newton & Co. to said Swofford Bros. Dry Goods Co. in cash; and any and all notes, checks and accepted drafts shall not be considered as payment, but merely as evidence of indebtedness. And upon taking possession of any notes and book accounts derived by said first party from the sale of said goods or any part thereof, said Swofford Bros. Dry Goods Company shall have the right to collect the same either in its name or in the
7 name of E. M. Newton & Co. by suit or otherwise, and in case of disputed notes and accounts against persons of doubtful solvency, said second party may compromise and settle the same or may extend the time of payment thereof in such manner and upon such terms as may to it seem advantageous and any new notes taken thereafter whether in the name of Mr. E. M. Newton & Co. or in the name of said Swofford Bros. Dry Goods Co. shall be held and considered in all respects the same as the original evidence of indebtedness.

4. This contract and the terms thereof shall apply to all future orders given by the E. M. Newton & Co. and to all future sales and shipments made to them by said Swofford Bros. Dry Goods Co. so long as any part or portion of the purchase price of the goods sold and delivered hereunder shall remain unpaid, said Swofford Bros. Dry Goods Co. shall have the right to terminate this contract at any time, and said E. M. Newton & Co. may terminate the same at any time by paying in full in cash whatever balance of the purchase price of the goods purchased and shipped shall then remain unpaid. Delivery of the goods properly packed and marked to a common carrier at Kansas City, Mo., consigned to the first party as above specified shall be deemed and considered a full and complete delivery thereof by said second party and all freight and transportation charges shall be paid by said consignees. The acceptance of goods subsequently sold and shipped by

the first party and the placing of the same io their stores and marehouses at New Lewisville, Ark., or elsewhere, shall be held and considered sufficient to bring such goods within and under the terms hereof, shall be mentioned or referred to in the order so given or in the invoices given and delivered with each invoice.

8 Said first party shall keep all goods purchased hereunder properly insured at their expence for the benefit of second party; but the loss or destruction of such goods by fire or otherwise, shall not cancel the indebtedness thereof but said first party shall still remain liable to second party for any part of the purchase price remaining unpaid.

In witness whereof the parties above named have hereunto placed their hands and seals in duplicate this 20th day of July, 1905.

E. M. NEWTON & CO.,
SWOFFORD BROS. DRY GOODS CO.,

Signed by Wm. Moore, Sec.

9 Unsecured Creditors. Schedule A (3).

Rosenthal Sloan Millinery Co., St. Louis Mo.	$4,835.82
Swofford Dry Goods Co., Kansas City, Mo.	7,973.35
J. Solomon Co., Chicago, Ill.	4,797.70
Rosenan Hosery Mill	172.22
Bray Clothing Co., Lewisville, Ky.	586.88
Appleby & Newman, New York	48.25
Kaiser & Co., New York	212.53
Luke Bros., New Orlenas	169.50
Tracy Morris & Co., Philadelphia, Pa.	114.77
Wyler, Ackerland & Co., Cincinnati, Ohio	1,151.60
Merrit Mfg. Co., Mayfield, Ky.	2,017.26
Ark. Carpet & Furniture Co., Little Rock, Ark.	175.00
Kalamazoo Corset Co., Kalamazoo, Mich.	434.80
S. G. Dryfuss & Co., Shreveport, La.	305.17
Wm. R. Moore Dry Goods Co., Memphis, Tenn	197.98
10 Purnell Dale Mills, Philadelphia, Penn.	57.25
Taylor & Parrott, Chicago, Ill.	124.50
Taylor & Parrott, Chicago, Ill.	124.50
Clark & Courts, Galveston, Tex.	1.60
G. W. Dobson, Lewisville, Ark.	540.00
Walker Lewis Mill Co., Kansas City, Mo.	13.13
Chas. Ruber & Co., Chicago, Ill.	18.00
C. F. Blank & Co., St. Louis, Mo.	24.72

R. C. Warrener, Lewisville, Ark..... 4.33
J. C. Breckenudge, Texarkana, Ark..... 6.00

Schedule A. (4).

Liabilities on notes or bills which ought to be paid by the drawers, makers, acceptors or indorsers.

None.

Schedule A. (5).

Accommodation paper. None.

11 Oath to Schedule A.

United States of America,
Western District of Arkansaw.

On this 2d day of July, 1905, before me personally came Ernest M. Newton and John F. Newton, the persons mentioned in and who subscribed the foregoing schedule, and, who being by me first duly sworn, did declare the said schedule to be a true statement of all their debts, in accordance with the acts of Congress relating to Bankruptcy.

Subscribed and sworn to before me this 3d day of July, 1905.

GEO. WEBBER,
Notary Public, Miller Co., Arkansas.

My commission expires Jan. 12, 1907.

12 Schedule B. State ment of All Property of Bankrupt.

Real estate ..... None

Schedule B. (2).

Cash on hand ..... None

Bills of Exchange, promissory notes, etc., as per list hereto attached.

None except such as referred to as held by the Swofford Bros. Dry Goods Co.

Stock in Trade, in business as wholesale merchant, about $9,000.00 as per estimate of invoice.

Household goods and furniture, etc.
E. M. Newton, as follows:

Watch .... $ 10.00
Horse .... $ 75.00
Buggy .... $ 25.00

Suite Furniture ..... $ 40.00

Total $150.00

John F. Newton:
Watch ..... $ 25.00
Suite Furniture ..... $ 15.00
Store fixtures estimated about $1,000

E. M. NEWTON,
J. F. NEWTON.

13 Accounts.

Messrs. French & Son, Lewisville, Ark....	$ 18.55
James Fort, Lewisville, Ark.....	7.00
Lizzie Ford, Lewisville, Ark.....	2.75
Steve Collins, Lewisville, Ark.....	43.30
R. R. Moore, Lewisville, Ark.....	23.69
Mattie Turner, Lewisville, Ark.....	2.05
W. J. Ford, Lewisville, Ark.....	17.75
A. S. Nix.....	5.20
W. H. Stevens, Waldo, Ark.....	5.00
Travis Boden, Texarkana, Tex.....	17.20
J. W. Franks, Fulton, Ark.....	28.41
W. A. Jerrel, Stamps.....	8.18
Wm. McDanniels, Stamps	2.00
L. O. French, Lewisville, Ark.....	25.13
Joe Kennidy, Lewisville, Ark.....	1.67
Garland Lenny, Lewisville, Ark.....	15.45
Old accounts considered uncollectible as per suspended account book.....	3110.55
Boom Fort, Lewisville, Ark.....	13.10
Cal Atkins, Lewisville, Ark.....	12.50
14 M. A. Towlu, Kelgou, Texas.....	41.50
W. E. Brames, Gellaham, Ark.....	21.15
T. M. Alford, Hughes, Tex.....	97.62
A. C. Maxey, Colvin, La.....	96.98
J. E. Robinson, Pittsburgh, Texas.....	3.50
C. F. Wood, Wallanburg, Ark.....	17.10
Mrs. Hatty Griswold, Lewisville, Ark.....	4.10
J. W. Foulkner, Cipress, Ark.....	84.58
Southern Dry Goods Co., Rhensburg, Ark.....	7.00
M. Smith, Spring Hill, La.....	50.50
H. L. Bunge & Bro.....	47.60
J. H. Whites, Redwater, Tex.....	49.80
Canterberry & Stuart, Bok Lema, I. T.....	10.50
D. E. Heard, Eubank, La.....	25.00

J. Y. Mann, Sumpter, Ark	30.95
Canterberry & Syuart, Bok Lema, I. T	10.50
Robereth & Webb, Nobete, La	48.66
T. E. Ball, Lewisville, Ark	51.71
Sahm Merch, Co	60.39
Sullvan & Smith, Taylor, Ark	68.30
W. E. Smith, Briston, Ark.	28.82
P. A. Pifkin, Wilton, Ark	31.88
S. P. Smith & Co., Smithland, Tex	30.00
J. W. Sotterwhite, Rhonesboro	93.75
H. K. Wilson, Jacksonville, Tex	177.09
M. C. Coh	6.30
Ethendge & Owens	5.35
L. D. Baynten, Chandler, Tex	52.15
Russel and Williams, New Hope, Ark	61.61
J. T. Loden, Savannah, Tex	5.01
Bank Co., Phasanton, La	16.25
A. S. Stevens, Commerce, La	27.02
15 W. B. Templer, Judson, Tex	72.13
D. C. Blank	90.00
K. C. S. R. R.	20.50
W. H. Maule, Lewisville, Ark	5.00
Gus Porter, Lewisville, Ark	2.00
Joe Smith, Lewisville, Ark	50.00
Fred Bell, Lewisville, Ark	1.00
M. Fulman, Lewisville, Ark	
Truck Farm account, Lewisville, Ark	880.80
W. R. Harrison, Lewisville, Ark	25.00
Joe Barham, Lewisville, Ark	14.45
J. C. Earlrath, Lewisville, Ark	75.80
T. A. McKinney, Lewisville, Ark	2.50
Wesley Powel, Lewisville, Ark	5.63
Dorse Cunnanham, Lewisville, Ark	28.75
W. J. Young, Lewisville, Ark	5.50
St. S. W. R. R.	543.50
Mrs. Foutch, Lewisville, Ark	23.75
R. L. Ford, Lewisville, Ark	46.85
C. H. Barham, Lewisville, Ark	11.00
F. Jordan, Lewisville, Ark	51.75
M. W. Mulkey, Lewisville, Ark	30.47
W. Johnson, Lewisville, Ark	15.19
A. Finch, Lewisville, Ark	3.50
C. T. Reeves, Lewisville, Ark	27.70
H. C. Newton, Lewisville, Ark	92.06
J. O. Smith, Lewisville, Ark	2.25

T. W. Weathersby, Lewisville, Ark	75.00
Hawkins & Moore, Foreman, Ark	26.30
I. L. Nix, Lewisville, Ark	137.65
O. B. Smith, Lewisville, Ark	10.41
J. S. Cook, Keiffer, Ark	7.10
Coats Bros	10.51
Padgett & Jones	12.50
J. M. Gill, DeQuincy, La	18.20
R. C. Trasser	14.50
Dr. M. R. Kennedy	18.50
J. H. Mitchell, McNabb, Ark	6.27
D. I. Russel, Colesboro, Ark	14.85

16 Oath to Schedule B.

United States of America, District of

On this 3d day of July, A. D. 1905 before personally came E. M. Newton and J. F. Newton the person mentioned in and who subscribed to the foregoing schedule, and who, being by me duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the act of Congress relating to bankruptcy.

Subscribed and sworn to before me this 3d day of July, A. D. 1905.

GEO. WEBBER,
(Seal) Notary Public, Miller Co., Arkansas.
My Commission Expires Jan. 12, 1907.

Schedule C.

17 50 shares stock in Lewisville Surrey Co., a corporation under laws of Ark. (Hypothicated to J. C. Smith, Cashier Merchants & Farmers Bank, New Lewisville) $1,250.00
Watch .....$ 10.00
Horse .....$ 75.00
Buggy .....$ 25.00
Suit Furniture.....$ 40.00

$150.00
$1,250.00
$1,400.00

E. M. NEWTON.

Schedule D.

United States of America, Western District of Ark.

On this 3d day of July, 1905, personally appeared E. M. Newton, the person mentioned in and who subscribed to the foregoing schedule, and, who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, and all of his liabilities individually, in accordance with the acts of Congress relating to bankruptcy.

GEO. WEBBER,
(Seal) Notary Public, Miller Co., Arkansas.

My Commission Expires Jan. 12, 1907.

18 Schedule E.

Watch	$ 25.00
Suit Furniture	$ 75.00
	$100.00

Schedule F. None.

J. F. NEWTON.

United States of America, Western District of Arkansas.

On this 3d day of July, 1905, personally appeared before me John F. Newton, the person mentioned in and who subscribed the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his individual the said schedule to be a statement of all his individual estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this 2d day of July, 1905.

GEO. WEBBER,
(Seal) Notary Public, Miller Co., Arkansas.

My Commission Expires Jan. 12, 1907.

19 Schedule of property claimed as exempt.

United States of America, Western District of Arkansas, Texarkana Division.

In re,
E. M. Newton & Co.
Bankrupt.

Ernest M. Newton, the above named bankrupt, states that he is resident of the State of Arkansas; that he is married, or the head of a family; and he claims as exempt and

released from the process of this Court, in addition to his wearing apparel and that of his family, the following described property, to-wit:

Watch	$ 10.00
Horse	$ 75.00
Buggy	$ 25.00
Suit Furniture	$ 40.00
	$150.00

E. M. NEWTON.

Subscribed and sworn to before me this 3d day of July, 1905.

GEO. WEBBER,
My Commission Expires Jan. 12, 1907.

(Seal) Notary Public, Miller Co., Arkansas.

20 In the District Court of the United States for the Texarkana Division of the Western District of Arkansas.

In matter of Est
E. M. Newton & Co. In Bankruptcy.
Bankrupts.

Whereas Ernest M. Newton and John F. Newton of Lewisville in the County of Lafayette and District aforesaid, on the 3d day of July, A. D. 1905, filed their voluntary petition in bankruptcy.

It is therefore ordered that said petition be referred to A. H. Sevier, one of the referees in bankruptcy of this court, to take such further proceedings as are required by said acts and that said Ernest M. and John F. Newton shall attend before said Referee on the day of and thence forth submit to such orders as may be made, by said referee, or by this court, relating to their said bankruptcy.

Witness the Honorable John H. Rogers, Judge of the said Court, and the seal thereof at Texarkana, Arkansas, in said District on the 3d day of July, A. D. 1905.

(Seal)

JOHN M. SOMERVELL, Clerk.

In the District Court of the United States, for the Western District of Arkansas, Tex. Div.

In matter of Estate of
E. M. Newton & Co. In Bankruptcy.
Bankrupts.

At Texarkana, Ark., in said District, on the 3d day of July, 1905, before A. H. Sevier, Referee in Bankruptcy, the petition of E. M. Newton & Co., that they be adjudged bankrupts, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been duly considered, the said E. M. Newton & Co. is hereby adjudged bankrupts accordingly.

In matter of Estate of
21 E. M. Newton & Co. In Bankruptcy.

Bankrupts. July 3d, 1905.

On this day upon the application of Loe Krouse a creditor of the estate of E. M. Newton & Co., Thad. M. Bryant was appointed Receiver of the Estate of E. M. Newton & Co. and filed his oath and bond as such, which said bond was approved by the referee.

July 13th, 1905.

In the matter of Estate of
E. M. Newton & Co. In Bankruptcy.
Bankrupts.

In said District on July 13th, 1905, before A. H. Sevier Refree, this being the day appointed for the first meeting of creditors under the said bankruptcy, and of which due notice had been given in the Recorder, I the said Refree, at the time and place mentioned in said notice did appoint Thad M. Bryan, as trustee of said estate, upon the application of the creditors.

22 Bond of Trustee.

Know all men by these Presents:

That we T. A. Bryant, of Texarkana, Ark., as principal, and F. W. Offenhauser of Texarkana, Ark., and H. H. Brown, of Texarkana, Ark., as sureties, are held and firmly bound unto the U. S. of America in the sum of Fifteen Thousand Dollars in lawful money of the U. S. to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves and heirs and executors firmly by these presents;

Signed and sealed this 13th day of July, 1905.

The condition of this obligation is such that if whereas the above named T. A. Bryant was on the 13th day of July, A. D. 1905, appointed trustee in the case pending in bankruptcy, in said court, wherein E. M. Newton & Company are

the bandrupts, and the said T. A. Bryant has accepted the said trust, with all the duties and obligations pertaining thereunto, now therefore, if the said T. A. Bryant, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust and shall faithfully and truly account for all moneys, assets and effects of the estate of said bankrupts, which shall come into his hands and possession, and shall in all respects faithfully perform all his afficial duties as said trustee, then this obligation to be void, otherwise to remain in full force and virtue.

Signed and sealed this 13th day of July, 1905.

T. A. BRYANT,
F. W. OFFENHAUSER,
H. H. BROWN.

United States of America, W. Dist. of Ark.

I, T. A. Bryant, do solemnly swear that I will support the Constitution of the United States, and that I shall faithfully perform all the duties of trustee herein, well and truly accounting for all money assets and effects that may come into my hands as such.

T. A. BRYANT,

Before me this 13th day of July, 1905.

A. H. SEVIER, Referee.

Filed 7, 1, 1905 and approved. A. H. Sevier, Referee.

Filed July 13, 1905. John M. Somervell, Clerk.

23 In the District Court of the United States, for the Western District of Arkansas, Texarkana Division.

In re
E. M. Newton & Co. In Bankruptcy.
Bankrupts.

Intervention of Swofford Bros. Dry Goods Co., of Kansas City, Mo.

Intervenors introduce the Schedule A of the bankrupt, listing the debt of Swofford Bros. Dry Goods Co., and the statement attached thereto in connection with the said debt, Exhibit A, thereto attached being a copy of the contract referred to in said statement between Swofford Bros. Dry Goods Co. and E. M. Newton & Co. under date of July 20th, 1904.

It is conceded that the contract above referred to is a copy

of the original to stand for all purposes in this hearing the same as the original.

W. N. Moore, being duly sworn testified as follows:

Q. State what official relation you have with Swofford Bros. Dry Goods Co.

A. I am Secretary of the Company and act as credit manager.

Q. State if you are acquainted with E. M. Newton or the firm of E. M. Newton & Co., and whether you are familiar with the transactions between them and Swofford Bros. Dry Goods Co. which resulted in the indebtedness existing in favor of Swofford Bros. Dry Goods Co. A. I am.

24 Q. I hand you the original of the contract copy of which is attached to the schedule and ask you whether or not you signed that in behalf of Swofford Bros. Dry Goods Co. A. I did.

Q. State whether or not E. M. Newton & Co. signed it, and if so, by whom.

A. It was signed E. M. Newton & Co., by Mr. E. M. Newton, in my presence.

Q. What became of the contract after it was signed?

A. It was filed away by me with the Company's papers.

Q. State whether or not Swofford Bros. Dry Goods Co. and E. M. Newton & Co., acted under that contract from an afterwards date. A. They did.

Q. State whether or not Swofford Bros. Dry Goods Co. sold E. M. Newton & Co. goods under that contract, and if so, to what amount.

A. We sold them to the amount of $15,367.57, as shown by the petition filed herein, under this contract after the date of its execution.

Q. State if these goods were sold them under that contract? A. They were.

Q. After the execution of the contract of July 20th, 1904, state whether you sold E. M. Newton & Co. any goods excepting under the terms of that contract. A. We did not.

Q. Now, what payments were made upon the goods so sold Newton & Company under that contract?

A. $2,059.01.

Q. What was done with regard to the balance due under the contract?

A. Swofford Bros. Dry Goods Co., I acting for Swofford Bros. Dry Goods Co., took back from Newton & Co. merchandise which had been sold under the contract to the amount

of $5337.21, and took an assignment of certain notes
25 and open accounts. The amount of the accounts was $8277.04, and the amount of the notes was $1684.32, at their face value. The balance due Swofford Bros. Dry Goods Co. at that time was $13,310.56, and accrued interest.

Q. In taking back these goods, state how you did so, whether at the original cost price, or whether they were depreciated in value.

A. We invoiced them at the original cost price, the prices at which we had billed them to E. M. Newton & Co.

Q. You speak of taking an assignment of notes and account, what notes and accounts?

A. The notes and accounts which were the proceeds of the sale of the goods sold E. M. Newton & Co. under this contract.

Q. I hand you now a paper signed by E. M. Newton, copy of which is attached to the petition of the Intervenor, marked Exhibit B, and ask you to state what that is?

A. It is the assignment executed by E. M. Newton of the open accounts before referred to, amounting to $8277.04.

Q. When was that delivered to you?

A. June 30th, 1905.

Q. And to the original which you hold in your hand, state whether or not there is a list of these accounts attached, showing the names, addresses and amount due from each?

A. There is, and a list of said notes and accounts is hereto attached marked Exhibit A.

Q. State what possession you obtained of the goods referred to in your deposition?

A. Actual physical possession was given to me of the merchandise referred to.

Q. State whether or not the merchandise referred to was superated from the other goods of Newton & Co., and delivered to you and placed apart from Newton & Co.'s other goods? A. They were.

Q. What transfer was made of the notes referred to?

A. They were endorsed by E. M. Newton and de-
26 livered to me.

Q. What transfer was made of the accounts?

A. A list of the accounts showing the name of the debtor, and his address amount due and date of the majority was made and delivered to me, attached to the assignment above referred to.

Q. Now, with these things in your possession, what became of them? Have you them now?

A. I held possession of them as long as I was here, and upon my leaving turned them over to Mr. Leo Krause, who was in our employ to hold physical possession of them after I left.

Q. About how long did you remain here, Mr. Moore, after the delivery of these possessions?

A. I think I left the next day or the next night.

Q. Mr. Leo Krause was in your employ, state in what capacity he represented Swofford Bros.?

A. He was salesman in this territory in the first instance, and I appointed him our agent in this matter to hold possession of these goods for us.

Q. State if any one came down after that, representing Swofford Bros. Dry Goods Co. in your place?

A. Yes sir. Mr. Ellis came down.

Q. What relation or authority did he have in the matter?

A. He had authority to represent the Company; he was our attorney and had power to act for us.

On Cross Examination, witness testified:

Q. Mr. Moore, how long have you known E. M. Newton?

A. Well, I don't remember exactly, perhaps four of five or six years.

Q. How long had Swofford Bros. Dry Goods Co. been selling him goods prior to July 20th, 1904?

27 Several years. I could not explain definitely, without referring to the books.

Q. Had you previously been selling goods to him upon open account?

A. Yes sir.

Q. Had you ever taken from him a contract, similar to the one referred to in your evidence, prior to that time?

A. No sir.

Q. Where was that signed?

A. In Kansas City, Missouri.

Q. Was it signed in your office? A. Yes sir.

Q. Who was present at the time besides yourself and Mr. Newton?

A. I don't remember that there was any one else present. Mr. Krause may have been present, but I am not sure.

Q. Had you ever been to the place of business of Mr. Newton at Lewisville, Arkansas, prior to this time?

A. No sir.

Q. Did you ever go there after this contract was signed?

A. At Lewisville? No sir.

Q. Were you ever in his store before or after the contract was signed up to the date that you finally took possession of the goods that you claim in this case?

A. I was in his store here in Texarkana, I think it was the day before the assignment and delivery was made.

Q. Did you not know the character of the business he was carrying on?

A. I knew through his own statements, and through the statements of representatives of our Company who has been in his store.

Q. Who were these representatives?

A. Mr. Leo Krause, and our adjustor Mr. Hanna, and various other times through our specialty salesmen who had been in his store who have told me.

28 Q. Had Mr. Hanna been to Lewisville to look at his stock of business? A. Yes sir.

Q. How often?

A. It would be difficult to state exactly, but I would be safe in saying several times. I know several times.

Q. After the contract of July 20th, 1904?

A. I don't know that Mr. Hanna was there after that date or not, I could not state positively, whether he was or was not.

Q. He had been there before that time?

A. Yes sir, and my recollection is at this time as I think of it more, that he was there once after that time.

Q. What was the character of the business carried on by Mr. Newton? A. At that time?

Q. At the time this contract was signed and after?

A. At the time this contract was signed he was doing both a retail and wholesale business. Subsequently he sold the retail end of his business and continued to do a wholesale business.

Q. At about what time did he discontinue the retail business?

Q. Only a few weeks before the failure?

A. My impression is that it was several months, or a year perhaps.

Q. He had about discontinued the retail business at the time this contract was signed?

A. I think not at the time the contract was signed.

Q. State whether he carried a stock of general merchandise and millinery, such as clothing, boots, shoes, hats, caps, and all kinds of merchandise of that natuer?

A. To what time does your question refer?

Q. To the time this contract was signed, and after?

A. I think, from what information I had, at the time the contract was signed, he carried such a stock.

29 Q. Your information then, was that he carried a general stock of merchandise at the time this contract was signed?

A. Yes sir, but about that time, if not at that time, he states his purpose of discontinuing the retail business and of discontinuing to handle a large number of the lines of goods which he was then handling.

Q. Now what was the class of goods that you sold him?

A. It would be described as furnishing goods and notions, would perhaps, in a general way, describe the goods.

Q. What would be included in these terms? We do not understand what line you had. Just tell the Court what goods are included in furnishing goods and notions.

A. They would include men's shirts, collars and cuffs, hosiery, ribbons, embroidery, and goods of that character.

Q. What would not be included in said goods?

A. Clothing; it would not include men's outer clothing.

Q. It did not include boots, shoes, hats, and that kind?

A. No sir.

Q. You knew that his business covered some lines of goods that you were not selling him?

A. Well, after he sold his retail business, which was about the time this contract was made, he represented to me that he would carry only such goods as we sold him; that he would buy of us excepting millinery and perhaps some clothing.

Q. Did you know he was buying from other creditors besides yourselves?

A. I knew he was buying of the Rosenthal-Sloan Millinery Co. I think that is the only other account I knew of.

Q. Did you know he was buying of Wm. R. Moore & Co.?

A. I do not think that I did.

Q. Did you know he was buying of the Merritt Manufacturing Co., clothing?

30 A. I don't know that I did.

Q. You do know however, that he was buying from other firms but you do not know the names of these firms?

A. About the only other firm I knew he was buying of, was the Rosenthal-Sloan Millinery Co.

Q. Did he not refer these firms to your house for information as to his standing and credit?

A. I don't know.

Q. Did you not receive letters of inquiry from different houses in regard to him?

A. I may have done so, but they would not necessarily imply that they were selling him; they have been trying to sell him,

Q. What day did you reach Texarkana in June when you came down here?

A. My recollection is that it was on the 29th of June.

Q. Did you go then to Mr. Newton and demand these goods that had been sold to him by your house?

A. Not immediately, no sir.

Q. When did you make that demand?

A. The next day.

Q. When he agreed to turn these goods to you did you have an invoice taken? A. I did.

Q. Who assisted in making the invoice?

A. Mr. Newton a young man who was his clerk whose name I don't know, Mr. Krause and myself.

Q. Did you make an inventory of the entire stock or only that which you got?

A. Only of such goods as were ours, which we could identify as goods sold to Newton & Co. by Swofford Bros. Dry Goods Co. under this contract, and these were the only goods which we invoiced, or took.

31 Q. Now, in taking that invoice, you stated that you put down the price at the original price. Did you add freight to this price? A. No sir.

Q. You took it at the original cost in Kansas City, not including carriage? A. Yes sir.

Q. Were you able to identify all of the goods that you took as goods shipped by Swofford Bros. Dry Goods Co.?

A. Personally, I was not able to identify every item. I recognized a great majority of them from the marks, lot numbers and brands on them. Those I did not recognize were identified as being goods sold by Swofford Bros. Dry Goods Co. under this contract to E. M. Newton & Co. by Mr. Leo Krause, our salesman.

Q. Were there any goods taken, to your knowledge, that had not been sold by Swofford Brs. Dry Goods Co. to Newton & Co?

A. There were not, and on the contrary, Itook especial pains to see that no such goods were taken.

Q. What character of merchandise was left on the shelves after you had separated the goods you claimed?

A. Principally millinery, men's clothing and some hosiery

and notions, and other furnishing goods which had not been sold by us.

Q. When you came to make this invoice, did you examine into Mr. Newton's financial condition, as to what creditors he owed or how much? A. Yes sir.

Q. How much did you find that his liabilities amounted to, at that time, aside from your own claim?

A. I don't remember. I haven't the figures at hand and I could not undertake to give them at this time.

Q. I just wanted approximately?

A. It was a great surprise to me to find him owing so much.

Q. He owed quite a number of houses? A. Yes sir.

Q. You knew at the time that this invoice was made that he owed other debts?

32 Counsel for Intervenors objects to the question on the ground that it is immaterial, irrelevant, and not within the pleadings, which objection was by the Court overruled, and the witness answers the question.

A. Yes sir.

Q. You knew that he was utterly insolvent?

Counsel for Intervenors enter the same objection as above, which was by the Court overrules, and witness answers the question.

A. My recollection is that his showing, while it showed a large indebtedness did not show him to be insolvent.

Q. Now, Mr. Moore, before you got through that inventory and investigation, is it not a fact that you knew or believed that Mr. Newton was insolvent?

Counsel for Intervenor enters same objection as before and the Referee overrules the objection, and witness answers the question.

A. I only know what his figures made me showed, and while it showed very heavy liabilities, it showed a surplus of assets over liabilities.

Q. State whether you had cause to believe or did believe Mr. Newton was insolvent at the time these goods were taken back.

Counsel for Intervenor objects on the same ground as contained in previous objection, and further because he is asking the opinion of the witness to be given upon a basis which

is not definite, and which might vary in the minds of different persons and what might appear reasonable cause to the counsel, might nor appear to be reasonable cause to any one else.

Objection was by the Referee overrules, and witness will answer the question.

A. I had no reason to believe that he was insolvent, but I had reason to believe that he owed a lot of money and would have difficulty in meeting his debts, a large part
33 of his indebtedness being then due.

Q. If you did not believe he was in a critical condition, you would not have taken back these goods and demanded a lot of accounts would you, Mr. Moore?

Counsel for the Intervenors enter an objection on the grounds that it is not within the issue, immaterial, and irrelevant, which objection is by the Refree overruled, and witness answers the question.

A. I don't know what I might have done under other circumstances than I found. I took the goods because I thought it was to my interest to do so.

Q. Did you not find the goods, which you took back from Newton & Co. mixed in on the shelves with goods which has been sold by other firms to Newton & Co.

Counsel for Intervenor objects to question, as immaterial, and not within the issues, which objection is by the referee overruled, and witness will answer the question.

A. There were other goods in the store besides what I took.

Q. Were your goods kept separate from goods sold to Newton & Co. by other firms?

A. I found them in the same room, but most of our goods were in one room, and most of the goods which had been bought from other firms were in a separate room. There were, however, some of our goods in both rooms but the majority of our goods were in one room which contained but a few of the goods which had come from other sources.

Q. There were other goods in the store besides millinery?

A. Yes sir, I have already stated so.

Q. These goods and millinery and the other goods that you claim were carried as one stock of goods apparently?

A. I suppose they were, they were all found in one building, and in the possession of E. M. Newton & Co.

34 Q. Now, in regard to those accounts, Mr. Moore,

state how these were selected. How did you get the open accounts and notes?

A. I demanded of Mr. Newton that he assign me such notes and open accounts as he had which were the proceeds of the sale of goods which we had sold him under the contract mentioned. He went through his ledger with me and picked out certain accounts which he stated to me were the proceeds of the sales of our goods and made a written assignment of them as such to me. The same is true of the notes.

Q. You did not know whether these notes and accounts represented the purchase price of goods which were sold by your firm to Newton & Co. or not?

A. Only from what Mr. Newton stated to me that they were.

Q. Did you advise Mr. Newton to go into bankruptcy before you left here to go back to Kansas City?

A. I think not.

Q. Had you employed attorneys to represent the Swofford Bros. Dry Goods Co. in regard to taking back the goods before you had gone back?

A. I consulted with attorneys here before I took any action at all.

Q. Did you have a contract, either verbal or otherwise, either expressed oh implied, whereby it was understood or agreed that you would turn these goods back to Newton & Co. when they could make a settlement or compromise with other creditors, and did not Newton turn these goods over to you with that understanding?

Counsel for Intervenor object to that question as wholly immaterial and particularly because it was not within the issues, or pleadings of this procedure. Which objection was by the Referee overruled and the witness answers the question.

A. There was no such agreement.

Q. Did you agree to take the goods over and then correspond with the other creditors with with a view of making a compromise of their debts, and then putting Newton back in possession of the stock? A. No sir.

Q. Mr. Moore, did you have any reason to believe, except from what Mr. Newton stated to you, that the accounts you received represented the price of goods that had been sold by Swofford Bros. Dry Goods Co. to Newton & Co.?

A. Only that he had agreed to keep separate such notes

and accounts and that in turning them over to me he stated to me that they were such notes and accounts.

Q. You knew that he had been running a general merchandise business? A. A year or so ago, yes.

Q. Didn't you know whether he had continued to run the business including goods that you had not sold him?

A. I knew that he was carrying millinery.

Q. Did you know he carried clothing?

A. I don't think that I did until I came here.

Q. I understand you now to say that when this contract was made on July 20th, 1904, that you understood that he was to handle nobody's goods except yours, excepting millinery.

A. That's what he told me he would do.

Q Did you not state in the beginning of this examination that he told you he would also carry clothing and perhaps other things?

A. My recollection is, of the agreement, that he would carry nothing but such goods as he got of us and millinery. Of course we handle clothing. We handle some lines of clothing.

Q. You have not answered my question, Mr. Moore. I asked you whether you did not statein the opening of this examination that when the contract of July 20th, 1904 was signed, Mr. Newton told you that he would carry other goods than those sold by your firm which would include millinery and outside clothing?

36 A. I don't think that I did.

Q. Is it not a fact that you knew he would carry such additional stock in order to make his stock complete?

A. No sir.

Q. Then you did not believe he would handle any goods of any firm except in the millinery line?

A. That's what he stated to me.

Q. Did Mr. Krause and Mr. Hanna report to you that he was only handling millinery in addition to the goods your firm had sold him?

A. I don't remember that I had a report from either of them on that specific point.

Q. Did you make any inquiries upon that point?

A. I don't remember that I did.

Q. When you selected the goods from the balance of the stock, state where you moved them from the shelves, and whether you put them in a place to themselves.

A. Mr. Newton was doing business on two sides of a hall, and most of our goods were on one side of that hall. We took

from that side all of the goods which we found that had not been sold by us under this contract. Then we took such goods as we found on the other side of the hall as we had sold under this contract and removed them into the other side, which contained ours.

Q. In other words, you divided the stock in such a way as to get the goods you claimed in one room and the others in the other room?

A. That's it, exactly.

Q. Did you know that you took a lot of goods as yours which had been sold by Wm. R. Moore & Co. to Newton & Co.?

A. No sir.

Q. Now, when these notes and accounts and goods were turned over to you, amounting to $15,000.00 state to the Court what release, if any, or receipt, you gave E. M. Newton & Co.?

37 A. I don't remember. If I gave one, it will speak for itself.

Q. Did you give a receipt of any kind?

A. I don't recall that I did.

Q. Did you accept these goods and notes and accounts in full of your claim against Newton & Co.?

Counsel for Intervenors enter an objection on the ground that it is not within the pleadings. The contract is in evidence and shows what the relations of the parties are.

This objection was by the Referee overruled and witness will answer the question.

A. No.

Q. Did you give Newton & Co. credit on your books for the notes and accounts?

A. We gave them credit for the goods, and expected to give them credit for such portion of the notes and accounts as were collected.

Q. You gave them credit for the invoice price of the merchandise? A. Yes.

Q. When did you have that credit entered on your books, Mr. Moore?

A. I really could not tell without referring to my books. I think very soon after I returned to Kansas City.

Q. You have actually entered credit for these goods?

A. Yes sir.

Q. When these goods were put back into the hands of the Trustee in Bankruptcy, what entry did you make on your books?

A. I don't know that I made any entry at that time. It is possible that I did not make an entry on the books until after I took final possession of the goods. I am not sure as to just what time the entry was made.

Q. Did you ever see the entry?

A. I don't know. I instructed it to be made. I know, at any rate, that he was entitled to credit for the goods at the original price and gave him credit accordingly.

Q. What did you enter on your books in regard to the notes and accounts?

A. No entry was made because we did not know what would be realized from them.

38 Q. Then you had actually given Newton no release or receipt on any kind?

A. I may have given him some receipt, but if I did I do not recall it.

Q. You did not intend to accept these notes and accounts in full for the claim?

A. I expected to give full credit for the goods and such amounts as we collected on the notes and accounts.

Q. How much was owing to Swofford Bros. Dry Goods Co. by Newton & Co. on the day this contract was made on July 20th, 1904.

Counsel for Intervenor enters an objection to the question on the ground that it is not within the issues, and not within the pleadings, which objection is by the Refree overruled, and the witness answers the question.

A. He was owing some thing, but I do not know how much. I expect about four or five thousand dollars, but I don't know exactly.

Q. You don't know how much goods that you had previously sold was in the house at the time this contract was signed as you had not gone there? A. No sir.

On Re-Direct Examination, witness testified as follows:

Q. In answering questions put you as to Mr. Newton's financial condition at the time you took these goods, state if you know that means Mr. Newton or Newton & Co. had

A. I did not know what his ability might be to raise of raising money?

money.

Q. Was he not talking at that time of taging a partner that would bring money into the business? A. Yes sir.

Q. State whether or not he was considering the question

of taking a partner at the time you came down here to see about his account?

39 A. He told me that he was.

Q. What became of the goods, notes and accounts which were received by you at the time you spoke of. Did Swofford Bros. Dry Goods Co. get them?

A. They were delivered over to the Trustee in Bankruptcy, or receiver, under an agreement, or stipulation made with the receiver.

Q. You have received nothing, then, from the notes and accounts? A. No sir.

Q. You say that you credited the Newton account with the goods turned over after your return to Kansas City?

A. Yes sir.

Q. Now, to make it plain, state why you have credited nothing on account of the notes and accounts turned over?

.A Because we have received nothing, and did not know what amounts will be collected on them.

Q. I will ask you to explain to the Court whether or not a large part of the goods taken back by you were not in their original packages, as shipped from the house of Swofford Bros. Dry Goods Co?

A. They all were in unbroken packages, or substantially all of them were, with our brands on the backs, and marks and lot numbers and also our cost and selling prices.

Q. State if these furnished data from which you could positively identify Swofford Bros. Dry Goods Co.'s goods?

A. Certainly.

Q. Now, as to the goods from other houses, state if they would not have the particular brands, marks, etc., of these other houses on them?

A. They probably would have, and I think did have in this case.

Q. Your goods would be easily and readily distinguished from any body else's goods would they not? A. Yes.

40 Q. I believe you stated that you yourself took special pains to see that no goods were taken except those under this contract? A. I did.

Q. And here you also particular as to the notes and accounts? A. Yes sir.

Q. State if the Leo Krause you refer to as having assisted in taking the inventory, was familiar with Swofford Bros. Dry Goods Co.'s lot numbers and cost and selling marks.

A. Yes. I know him to be, as he has been our salesman for years and actually sold the goods in question.

On Re-Cross Examination, witness testified:

Q. What do you mean by the goods having been found in Newton & Co.'s store in unbroken packages?

A. I mean that they were in unbroken packages, in contradistinction to what they would have been in a retail store. He did a jobbing business and himself sold goods in original packages, hence nearly all, if not quite all of the goods were in the same packages, and in the same condition as when they were shipped by us.

Q. Did you take back only the unbroken packages?

A. I don't remember that there were any broken ones.

Q. Did you take back only such goods as had been sold him since he had begun to do a wholesale business?

A. Yes sir.

Q. Have you an itemized statement with dates and amounts of the goods which were shipped by your firm to Newton & Co. since July, 1904? A. Yes sir.

Q. Will you produce it? A. Yes sir.

41 Q. Will you file it as an exhibit to your deposition?

A. Yes, I will file it as an exhibit.

Leo Krause, being duly sworn, testified as follows:

Q. At the time of the transactions which are the subject of inquiry here, Mr. Krause, and prior thereto, state what relation you bore to the Swofford Bros. Dry Goods Co.?

A. I was employed by them as traveling salesman, representing this immediate territory, that is, Southwestern Arkansas a portion on Eastern Texas and Louisiana.

Q. Who sold the goods to, E. M. Newton & Co. under this contract?

A. I did. That is, he bought the goods through me.

Q. At, or about the time of the execution by him of this contract, state if you know what became of the goods he had on hand; the old goods?

A. My understanding about it is that he opened up two separate stores outside of his wholesale business. My understanding was, and is at present, that he run one store as a Gents Furnishing Goods Store retail. I have forgotten under what name whether it was run under the name of E. M. Newton & Co. or not but I believe it was to have been in charge of John Newton to conduct a retail gents furnishing goods business. The other store was a credit concern, organized under the style of Lewisville Supply Co. and at these two places Mr. Newton was to run out all of his retail stock, and keep

the other, or main establishment as wholesale only, with what goods he would still retain from the stock he had on hand or had at that time, with the new goods which I understand was practically all of the goods in the wholesale department.

Q. When he moved over here, what opportunity did you have to know what goods he moved to Texarkana?

42 A. I was in the place of business several times, looked over his stock. I don't know just how often. I was there, I suppose, every two or three days.

Q. In the stock here, state whether or not there were goods bought from Swofford Bros. Dry Goods Co., I mean, the Swofford Bros.'s goods on hand?

A. To the best of my belief, everything brought over from the Lewisville stock, and picked out by Mr. Moore and myself as the Swofford Bros. Dry Goods Co.'s stock, was goods bought since the signing of this contract.

Q. State how you knew the goods to be bought since the signing of the contract?

A. In selling Mr. Newton eighty percent or more of his purchases would be made at the house of Swofford Bros. Dry Goods Co. in Kansas City, and at the request of Mr. Newton while he was buying goods in the house at Kansas City, I would invariably be with him and follow him from floor to floor, and in addition, I would look over the invoice, and go into the shipping room and assist in getting the goods out, part of the time packing and shipping, and was there at the time it was packed.

Q. In looking at the goods here with a view of separating the goods sold under this contract, what means of identification did you have?

A. I have handled the goods of the Swofford Bros. Dry Goods Co. for so many years, that with the marks on the packages, I can identify almost any piece of goods that would come from the Swofford Bros. Dry Goods Co. The Swofford Bros. Dry Goods Co. has a mark that is put on every package when it leaves a floor for the shipping room, and as these goods were in original packages you could see the shippers check on the bottom of almost every box, and on the ticket thereto attached.

Q. How about lot numbers and cost marks?

A. I could also identify from the various lot numbers and cost marks.

43 Q. State now if any goods were delivered to Swofford Bros. Dry Goods Co. that were not sold under the contract of July 20th, 1904.

A. None that I know of.

Q. State whether or not they were separated from other goods of E. M. Newton & Co.

A. They were.

Q. How were they delivered to Swofford Bros. Dry Goods Co. acting through Mr. Moore?

A. All of the goods, or very nearly all that were bought from Swofford Bros. Dry Goods Co. were stored, or kept, in one of the two rooms occupied by E. M. Newton & Co., and all the other goods that were stored in the same room were taken out, picked out rather, by Mr. Newton principally, myself assisting him, and taken over to the other room, which was known as the Millinery Department, and some few goods, such as ribbons, that was bought from Swofford Bros. Dry Goods Co., but kept in the Millinery Department was brought over and placed with the Swofford Bros. goods.

Q. Who took possession of them and how?

A. Mr. Moore and myself took possession, after looking over them carefully, and having Mr. Newton to look over them, and finding that there was not anything left in this room except the goods, or such goods as was bought from Swofford Bros. Dry Goods Co., Mr. Newton them simply told us that that part of the goods was ours and we could take them.

Q. How did you take them? State whether you locked them up or not and when you did?

A. There was a large arch being without a door, and we piled some counters and closed up this opening; nailed up the back door that led from this main room to the office. I had a key and locked up the down stairs.

Q. When you spoke in your answer just given, of goods from the Swofford Bros. Dry Goods Co., state whether you are confining yourself to goods bought under the con-

44 tract of July 20th, 1904. A. I am.

Q. State whether or not in these goods so delivered to you, there were any goods of Swofford Bros. Dry Goods Co. which had been bought before the existence of this contract of July 20th, 1904.

A. Not that I know of.

Q. Was any body else's goods in that lot of goods delivered to you?

A. No sir. On the contrary there were two or three lots that Mr. Newton insisted, and he actually thought himself, that came from Swofford Bros. Dry Goods Co., and wanted us to take them, but I did not take them, as I did not know their mark and told Mr. Newton that if they came from us I did not know we had such goods and carried them back myself into the other room across the hall. In fact, I even went further and stated to Mr. Newton positively that I did not want anything at all left in the room unless I could swear to it, to the best of my knowledge and belief that it came from us, and was Swofford Bros. Dry Goods Co. goods, and and sold after the contract of July 20th, 1904.

Q. How long were you in the employ of the Swofford Bros. Dry Goods Co.?

A. About five years I think.

Q. From about when to about when?

A. From something over five years ago to a little over a month and a half ago.

Q. You are not in the employ of the Swofford Bros. Dry Goods Co. now? A. No sir, I am not.

Q. You have referred to the goods, please explain what you know about the transfer of the notes and accounts which are the subject of controversy here.

A. I don't know much about them. That transac-
45 tion was made without my being present, and all I know about the notes and accounts was from Mr. Moore; what he told me, I mean. Mr. Newton then came in and, in my presence, marked on the ledger such accounts as he transferred to Swofford Bros. Dry Goods Co., and that is all I know about the notes and accounts as I was not present.

Q. State whether these notes and accounts were transferred to Swofford Bros. Dry Goods Co. as the proceeds of goods sold after the making of the contract of July 20th, 1904?

A. Except from hearsay, I don't know.

Q. Did Newton say that?

A. I don't know. I was not present when these transactions were made.

Q. Who remained in possession of this property, after it was turned over by E. M. Newton & Co.?

A. Part of the time myself, as Mr. Moore turned it over to me and I remained in actual charge as the agentof Swof-

ford Bros Dry Goods Co. until Mr. Ellis came down and then I turned thekey over to him, to the best of my recollection, and he took charge of it.

On Cross Examination, witness testified.

Q. I believe you sold about all the goods that were purchased from Swofford Bros. Dry Goods Co. by E. M. Newton & Co., did you not?

A. I did, from the time that I had been with Swofford Bros. Dry Goods Co., but Mr. Newton bought goods of them before I was in their employ.

Q. When did you bekin, personally, to make sales to Newton & Co? A. About five years ago.

Q. And that kept up, during that entire time until their failure? A. Yes sir.

Q. This contract of July 20th, 1904, was the only
46 contract of that kind that E. M. Newton & Co. had given to Swofford Bros. Dry Goods Co.?

A. The only one that I knew of. If there had been any other, had not heard of it or been advised of it.

Q. This contract was signed up in Kansas City, was it not, in the presence of yourself and Mr. Moore?

A. No sir. I was not present. I was outside of the office.

Q. You knew that it was signed?

A. Mr. Newton showed me a copy of it a few minutes after it was signed.

Q. You kept advised all the way along, as to the interests of Swofford Bros. Dry Goods Co. with their customers?

A. Yes sir.

Q. You have, I believe, already stated that you were at New Lewisville quite often? A. Yes.

Q. And, I presume went to see Mr. Newton nearly every time you were there? A. Yes sir.

Q. Newton was running a wholesale business at New Lewisville under the name of E. M. Newton & Co., was he not? A. Yes, sir.

Q. He also carried on a business under the name of the Model Furnishing Co. where retail goods were sold?

A. They had a store of that kind, but I don't know the name of the firm.

Q. You referred to the Lewisville Supply Co., is it not a fact that that company was a private corporation, and that Newton only had some stock in it, and did not run it in his own name, but that it was run under that name?

A. I stated that before, but I don't know.

Q. The goods you sold were sold to E. M. Newton &
46½ Co.? A. Yes sir.

Q. How much did Newton & Co. owe Swofford Bros. Dry Goods Co. at the time this contract was made July 20th, 1904? A. In the neighborhood of $5,000.00.

Counsel for Intervenors enter an objection to this question and answer.

This account of Swofford Bros Dry Goods Company is the matter now in controversy in this Intervention, and is competent for the Trustee to make any inquiry to this competent party as they are proper, therefore the objection is overruled.

Q. At what time did Newton & Co. move over from New Lewisville to Texarkana?

A. He moved about the 1st of June, 1905.

Q. Did you sell Mr. Newton any goods after he moved over here? A. I think not.

Q. Now, in moving the stock of E. M. Newton & Co. from Lewisville to Texarkana, did you help him in moving, or in checking stock in any way? A. No sir.

Q. You did not take an invoice of it before it was moved, or after it was received here?

A. No sir, I did not until the sale was made on June 30th, 1905.

Q. Mr. Krause, why do you say that none of the goods was in the stock at Texarkana, which had been sold by Swofford Bros. Dry Goods Co. to E. M. Newton & Co. prior to July 20th, 1904. Is not that merely a guess on account of the probability of the goods, or a greater part of them having been sold?

A. No sir. I am positive, almost absolutely so, for the fact that I always knew almost every season what goods Mr. Newton would buy. He bought very few items, but would buy them in large quantities, and I am positive as I can possibly be, that the items we took were sold after the signing
of this contract, for they consisted of good large quan-
47 tities of such items as were usually sold by him, and to the best of my belief, I think they were goods bought by him since the signing of this contract.

Q. Would a merchant have remarkable good fortune to sell all of the stock on hand in a particular season, up to the time the next season comes on, and is it not very unusual for such to happen?

A. He would be, but Mr. Newton has these two stores

previously mentioned, to unload on, and all broken lots he had left went to them. That was his cause of opening these two stores, so as to get rid of all the broken lots and little odds and ends that he would have left prior to the signing of this contract. In fact, Mr. Newton stated to me that that was the principal reason that he opened up these stores.

Q. You have shown that Newton had the opportunity of selling these goods, and also had other stores where they might have been placed, but have you sufficient knowledge to state positively that all these goods had actually been disposed of before July 20th, 1904, or is it merely guess work on your part?

A. I don't know what Mr. Newton did with the goods purchased prior to this contract, whether he sold them to his regular customers, or unloaded all of them at his two stores, but I do know to the very best of my knowledge, that there were none of that left in the stock of goods he turned over to us at the time of this delivery to us of June 30th, 1905.

Q. What class of goods did Swofford Bros. Dry Goods Co. sell to E. M. Newton & Co. after July 20th, 1904?

A. Principally gents furnishing goods, a few notions, lace, embroideries, and ribbons, hosiery and underwear, and a few ladies ready made garments.

Q. In the gents furnishings, did that include pants, and vests and coats, shoes, boots, caps and hats and underwear?

A. It includes pants and underwear. We dont carry coats.

48 Q. Whom did he buy coats of? A. I don't know.

Q. Of whom else did he buy notions?

A. I don't know.

Q. Of whom else did he buy laces and ribbons?

A. I think he bought them from Rosenthal-Sloan Millinery Co.

Q. You have stated the kind of goods you sold to E. M. Newton & Co., state the kind of goods he carried in stock in addition to what you have named.

A. He carried men's clothing, I believe that is about all that could be designated as a separate class of stuff. He carried, however, some notions and some furnishing goods that were not bought of us. I mean also to include millinery.

Q. Now, in this wholesale department, where your goods were carried, and where other lines of goods and mens cloth-

ing were kept in stock by E. M. Newton & Co., state whether there was one store or more. I refer to the wholesale department of E. M. Newton & Co. at New Lewisville, Arkansas.

A. At Lewisville there was only one large upstairs store room in which he kept his wholesale stock. The retail stock was in the name of the Model Furnishing Goods Co. in another building, and the Lewisville Supply Co. in the same building down stairs.

Q. You noticed, in this wholesale stock, that there was quite a lot of goods that had been bought from other parties?

A. Yes sir.

Q. You knew that there was some of the goods that E. M. Newton & Co. had bought from other parties, were the same class and kind of goods that were also being furnished by Swofford Bros. Dry Goods Co.? A. I did.

Q. The greater part of the millinery was furnished by the Rosenthal Sloan Millinery Co.?

A. I think so. I think ninety per cent. of it was.

49 Q. You knew he was getting goods from different wholesale houses of different states and towns?

A. I suppose I did.

Q. Did you ever tell any body, any creditor of E. M. Newton & Co., about this contract of July 20th, 1904?

A. No sir. I have never been asked about it.

Q. It was never put on record? A. No sir.

Q. In fact, I suppose you had heard nothing of this contract since it was signed until this trouble came up, had you?

A. On the contrary, I knew of its existence, and the goods I sold were almost principally under that contract.

Q. Was his contract ever referred by any one, to your knowledge after the date it was signed in Kansas City, up to the time Mr. Moore came to Texarkana?

A. Yes sir, by Mr. Moore.

Q. To whom? A. To me.

Q. He never told anyone else, did he?

A. I don't know. I never asked him.

On Re-Direct Examination, witness testified:

Q. I failed to ask you what condition these goods that were delivered back to Swofford Bros. Dry Goods Co. on June 30th, 1905, were in, so far as the original packages were concerned. I don't remember whether you stated it in your answer. Please state now.

A. The goods turned over to us were in their original packages; I mean by that, namely, that the shirts, which

usually come in half dozen to a box, were in half dozen boxes. Such goods as come a dozen in a box would be a dozen in a box. In fact, alsomst every package was found just as it left the house in Kansas City.

50 Q. In answering the question as to the old account due by Newton & Co. at the time of the execution of this contract of July 20th, 1904, you state that they owed about $5,000.00. Please state what became of that indebtedness at the time of the execution of the contract of July 20th, 1904?

A. The amount of that indebtedness was divided into sums ranging from $250.00 to $350.00, which were drawn up in the shape of sight drafts or checks dated ahead, and due at from ten days to two weeks apart. The account was closed up, and these checks or drafts were credited and a new account started, or rather the old account ruled up.

Q. Then at the time of the execution of the contract of July 20th, 1904, the account opened on that date?

A. Yes sir.

W. N. Moore, re-called, on direct examiation, testified:

Q. In connection with the old indebtedness to which you referred to in your examination in chief as existing prior to the contract of July 20th, 1904, please state what disposition was made of that account.

A. Mr. Newton gave us checks, drawn on some bank at New Lewisville, Arkansas, for various sums, the checks being dated ahead, at intervals of a week and ten days apart, and the aggregate of these checks covering the amount of the indebtedness, and the account was closed by these checks.

Q. State whether or not after the execution of the contract of July 20th, 1904, you continued the old account or opened a new one?

A. It may have been continued on the same page of the ledger, but it was an entirely new account. We began a new deal under this contract, and in selling under the contract we practically opened a new account.

51 Q. It doubtless will appear from the invoices, but for greater convenience we ask you here to explain to the Court the terms of sale on invoices sold and shipped to E. M. Newton & Co., that is, explain to the Court what is known as datings, and terms, so as to indicate when the invoices sold would fall due.

A. The goods were sold on a credit of four months. That is, 60 days dating and 60 days time. They give the purchaser

the option of paying the bill, less the full discount at the end or 60 days, or, if he does not avail himself of that privilege, the bill may run two months longer, when it is due without discount.

Q. That is, if a bill was sold on July 20th, 1904, the purchaser would get 60 days dating, say about September 20th, and 60 day time thereafter, which would make it fall due November 20th, 1904, or thereabouts?

A. I think on goods bought at that particular season of the year, in this case and in most cases, we give even longer dating than 60 days, or give a season dating because they are fall goods and we give fall dating. I don't remember what the dating was in this case, but I think it was at least October 1st, and possibly November 1st, from which he would have 60 days to pay the bills in.

On Re-Cross Examination, witness testified:

Q. Now, this contract you had with E. M. Newton & Co. was never placed on record in any way, was it?

A. No sir.

Q. Did you ever notify the commercial world in any way that you had such a contract? A. No sir.

52 E. S. Ellis, being duly sworn, testified as follows:

Q. Are you the Mr. Ellis referred to by Mr. Moore as being the attorney or agent for Swofford Bros. Dry Goods Co., who came down and assumed charge of the C. M. Newton & Co. matter here? O. I am.

Q. Upon your arrival here, state what possession you received of the goods, notes and accounts in the controversy?

A. I found the goods separated or set apart in a room by themselves, and the entrances thereto barred up, and Mr. Krause in possession of the key of the room. I found that Mr. Krause had the notes and the assignment of the accounts in his possession.

Q. How long was that after Mr. Moore left her, do you know?

A. It must have been about three days, I think. Mr. Moore left here Friday night, and I was here Monday.

Q. Now, upon your taking charge of this matter, what occurred?

A. After I arrived Mr. Krause turned over the keys to me, of the room in which the goods were stored, and he and I together put extra fastenings on the doors and entrances, and he also turned me over the notes and accounts, and I retained

them in my possession until the 4th day of July. In the meantime, E. M. Newton & Co. had filed their petition in bankruptcy, and Mr. T. A. Bryant had been appointed receiver, and had made a demand upon me as it were, that I deliver these goods and notes and accounts over to Mr. Bryant as receiver. The demand was first made by the receiver and the Referee on the 3rd day of July. I refused to surrender possession at that time. On the evening of the 3rd, and on the morning of the 4th, and in fact continuing through the day of the 4th, we had various conferences looking towards the adjustment of the trouble, the Referee and the Receiver still asking for possession, and the demand being refused by me, we tried to enter into various contracts, and I think one or two were prepared and rejected either by the Referee or myself until finally, in the afternoon of July 4th,
53 we talked the matter over here with the Referee, and we agreed upon the terms and the stipulations that should be made by Swofford Bros. Dry Goods Co on one part, and the Receiver, with the approval of the Referee on the other part, and that stipulation was reduced to writing and signed up.

Q. I hand you a paper and ask what that is?

A. The stipulation that I refer to was made and executed in triplicate, and the paper that you now hand me is one of the copies of the stipulation.

Q. What became of the other two?

A. One of the copies was retained by me for Swofford Bros. Dry Goods Co.; one was delivered and retained by the Receiver, and the other, if I am not mistaken, was delivered to the Referee, and retained by him.

Q. A copy of that stipulation is attached to the Intervention in this case. State whether or not it is a true copy?

A. It is a true copy.

It is conceded that the copy hereto attached is a true copy of the stipulation, and may be considered as the original for the purposes of this case.

Q. Now, what was done with the goods, notes and accounts after the execution of the stipulation and its approval by the Referee?

A. I then gave the key of the room in which the goods were locked to the Receiver, and delivered to the Receiver, in person, the notes and accounts which had been by E. M.

Nwton & Co. assigned to Swofford Bros. Dry Goods Co. I turned them over to him on the terms of the stipulation.

Q. State whether or not you would have delivered the possession of the goods, notes and accounts to the Receiver, except under this stipulation, and the terms and conditions thereof.

A. I never should. I had refused repeatedly to surrender possession until the stipulation had been signed, and never should have done so.

Q. The reason for, or the inducements which led to the delivery of these goods, notes and accounts was the stip-
54 ulation and the terms and conditions of it. Is that correct?

A. It was these matters that are contained in the stipulation that were discussed by the Receiver, and the Referee and myself, and especially between the Referee and myself, and their bearing upon the situation. I produced such arguments as I was able to that Swofford Bros. Dry Goods Co. were entitled to hold the goods and notes and accounts under their contract of July 20th, 1904, and the Receiver and the Referee pointed out to me various reasons and arguments why Spofford Bros. Dry Goods Co. were not entitled to hold them, and while fe probably did not convince each other as to the correctness of our respective views, we found, finally, a middle ground upon which we could agree as to the disposition which should be made as to the disposal of the property and the stipulation is the result of that agreement.

Q. Who participated in behalf of Swofford Bros. Dry Goods Co. in the discussion of the question of matters which ultimately resulted in the execution by the Receiver and yourself, with the approval of the Referee, of this stipulation?

A. I think I took a leading part, in behalf of Swofford Bros. Dry Goods Co., and Mr. George Webber was present on several occasions.

Q. Who actually made the stipulation and settled the terms and conditions of it as it was finally signed and approved?

A. The stipulation as finally signed is largely the result of discussions between the Referee and myself. Some of the clauses contained in the stipulation are by reason of suggestions made by the Referee, and some of them, on the other hand, are the result of my own ideas. It was a compromise.

Q. You mistake the question I asked. I asked who in behalf of Swofford Brothers Dry Goods Co., or representing

Swofford Bros. Dry Goods Co., executed the stipulation as finally signed and approved by the Court?

A. Myself.

55 Q. Were any representations made by you or any one in behalf of Swofford Bros. Dry Goods Co., either of facts which did not exist, orany untrue statements of facts existing, which led to the execution of this stipulation?

A. No sir, I know of nothing. I had no more information regarding the matter than was possessed by the Receiver, or by the Referee. The only things we went into particularly, was the purely legal questions, and it was questions of law upon which we negotiated and tried to convince each other.

Q. Was any deception used by you, or an one, in behalf of Swofford Bros. Dry Goods Co. to induce the signing of this stipulation? A. None whatever.

Q. State whether the facts as they existed, were equally known to yourself, the Receiver and the Referee, upon which the stipulation was based?

A. I think so. I know of nothing in regard to the matter but what was openly discussed by the Referee and the Receiver at the time. They seemed to have knowledge of every fact connected with the discussion that I had.

Q. Have you, or Swofford Bros. Dry Goods Co. any knowledge of any other facts or circumstances, other than those discussed at the time this stipulation was entered into in connection with the property embraced in said stipulation?

A. I know of nothing and have heard of nothing new relative to this transaction or controversy, which was not fully talked over and discussed at the conferences which resulted in the execution of the stipulation referred to. I remember at the time, that some question was raised as to whether Swofford Bros. Dry Goods Co. would be able to prove, in case necessity for proof devolved upon them, that the notes and accounts here turned over, were actually the proceeds of sales of their goods, and upon that question I then took the

56 position the same as I take now, that it was the duty of E. M. Newton & Co. to keep the notes and accounts separate, and that they having on demand of Mr. Moore, turned over those in controversy, as the notes and accounts derived from sale of Swofford Bros. Dry Goods Co.'s goods, that the bankrupt himself, or any receiver or trustee in bankruptcy would be estopped from denying the truth of this statement. I never pretended to know what the truth of the matter was, but took that position as a matter of law.

Q. State whether or not it was mentioned in the discussion leading up to this stipulation, that Swofford Bros. Dry Goods Co. desired to retain their possession and let the trustee, if he and the Court saw fit, institute his action for possession.

A. That was exactly my position at that time, and so stated to the Receiver and the Referee. On the other hand, the Referee urged with considerable force, that such proceeding, while the result in the end would be the same, would occasion a long period of time to thus compel the Trustee to bring separate action against Swofford Bros. Dry Goods Co., and that in the meantime, the property would deteriorate in value to such an extent that neither would realize much money from same at the end of the litigation, and the Referee also insisted, with much force, and justly I thought at the time, that under that method of settling, no one would be authorized or able, at least, to enforce collection of the notes and accounts; that therefore a large loss would result. I insisted that the possession of Swofford Bros. Dry Goods Co. was valuable to them, in case of suit brought by the Trustee, and theburden of proof would be upon the Trustee, and it was, as I say, discussed back and forth and finally the stipulation, as written up, was agreed to and signed, it being deemed, at that time by both to be the best interest of the estate.

Q. And you state that if it had not been for the terms and conditions and concessions contained in the stipu-
57 lation, the same would not have been signed or possession surrendered?

A. I never should have signed it otherwise.

On Cross Examination, witness testified:

Q. What day did you reach Texarkana?

A. I reached here Monday morning, I think the 3rd day of July.

Q. The stipulation you refer to was signed on the next afternoon, the Fourth of July?

A. On the afternoon of July fourth.

Q. Did you write the Intervention as filed by Swofford Bros. Dry Goods Co. in this case? A. I dictated it.

Q. Did you dictate any part of the petition in Bankruptcy filed by E. M. Newton & Co.? A. I did not.

Q. Did you dictate that part of Schedule A which follows the item of Swofford Bros. Dry Goods Co. of Kansas City, Missouri, showing their claim to be $13,310.56?

A. No sir, I did not. As I remember I was there when that part of it was written, and made suggestions, and offered to dictate it, but Mr. George Webber, who was operating a typewriter wanted to include some of the suggestions I made with some ideas of his own, and the result is hardly chargeable to any one person.

Q. The statements following the claim of Swofford Bros. Dry Goods Co. show the transaction of June 20th, 1905, wherein certain goods, notes and accounts had been turned over to Swofford Bros. Dry Goods Co. was "for goods of the said Swofford Bros. Dry Goods Co." Did you not dictate that part of said statement?

A. I don't recollect that I dictated any part of it. I recall that when they reached that point in making up the schedule, that the question came up as to whether Swofford Bros Dry Goods Co. should be included as a creditor, and some one suggested, either Mr. Searcy or Mr. George
58 Webber, or some one else, that Swofford Bros. Dry Goods Co. was no longer a creditor, and should not be named in the schedule, and I remember saying that inasmuch as the debt was not paid by truning over the accounts and notes, that I thought they should be put in as a creditor, and the full facts in regard to the whole transaction be stated and set forth; other suggestions were made and it was finally written up as it appears in the petition.

Q. There were three attorneys present there, Mr. George Weber, yourself and Mr. Searcy?

A. I was present part of the time. I was in and out. I was not paying any attention to the drawing up of the papers, except that occasionally some point was referred to me.

Q. What day was that, Mr. Ellis?

A. It was the day the petition was filed. My recollection is that it was July 3rd.

Q. As I understand your testimony you stated that the Referee agreed that the notes and accounts in fact did represent the purchase price of goods sold by Swofford Bros. Dry Goods Co., and that if he had not done so, you would have declined to turn the goods over?

A. I did not say that I insisted upon that feature. I stated that I would not have turned them over if we had not agreed upon the basis as set forth in the stipulation.

Q. I believe you stated that your position, from a law

point of view, was that it was the duty of Mr. Newton to keep the notes and accounts of these goods sold by Swofford Bros. Dry Goods Co. separate, and if he did not do so, and turned over certain notes and accounts, that this should be binding upon the creditors of the bankrupt, and that the Trustee would be estopped from contesting?

A. You have not stated what my testimony was
59 I made no reference to the creditors of the bankrupt. That was substantially my position. I believed then, and I believe now, the law to be that if Newton, whose duty, under the contract, was to keep separate accounts, should intermingle his accounts, and should turn over other accounts to Swofford Bros. Dry Goods Co. as being accounts and proceeds derived from the sale of their goods, that he would be estopped from denying the truth of his statements, and I believe that his successor, namely, the Trustee in Bankruptcy, would be equally estopped from deriving any benefit from contesting.

Q. In assisting, or making suggestions in drafting Schedule A attached to the Petition in Bankruptcy of E. M. Newton & Co. were you and Mr. George Webber doing this at the request of E. M. Newton & Co., in facilitating their going into the Bankrupt Court?

A. I don't know what actuated Mr. Webber in operating the typewriter, except that he stated it to be impossible to secure a stenographer to go the work. I had no interest in the matter whatever, merely made the suggestions because some one asked me what should be put in.

Q. You and Mr. George Webber were assisting Mr. Searcy in getting up his papers in filing this petition in Bankruptcy?

A. Mr. George Webber was operating thetypewriter. I was not assisting, and made no suggestions except when some one asked me my advice, which was done at several different times, about the form of the petition.

Q. Did you, as a matter of fact, ascertain that Mr. Newton did not keep a separate account on his books, showing the goods that he sold which were secured from Swofford Bros. Dry Goods Co.?

A. No sir, I have never seen Mr. Newton's books, and have no information, and never have had any information in regard to the matter of keeping his accounts. The only account on the books of Mr. Newton that I ever looked at was the account of Swofford Bros. Dry Goods Co., on his ledger.

60 Q. That account did not show that he kept anything to indicate what sales had been made, or to whom, or the amounts?

A. I saw that account yesterday for the first time. It simply shows the value of the merchandise received, and the amounts of payments made.

Q. Did you talk, Mr. Ellis, with Mr. Ernest Newton, and ask him whether these notes and accounts, which had been turned over, represented goods that had been sold by Swofford Bros Dry Goods Co. to E. M. Newton & Co.?

A. I do not think I ever asked him anything about it. I don't remember ever having a conversation in regard to them with him.

Q. Did you talk with Mr. Newton when you were here?

A. I tried to talk with him, but he was very uncommunicative in regard to busiess matters; was very uncommunicative.

Q. Did he not tell you that the accounts were mixed?

A. He told me nothing about the accounts whatever. I never asked him about the accounts and had no conversation with him upon the subject.

A. H. Sevier, Special Master:

The Referee here makes the following statement, which will be considered as a part of the testimony in this case:

In justification of the approval by the Referee of the admission of the Receiver, made in the agreement of July 4th, 1905, between the said Receiver and the Swofford Bros. Dry Goods Co., attached to the Intervention of the said Swofford Bros. Dry Goods Co. at bar,—the Referee would state, that, as far as he was concerned in the matter, he relied implicitly upon the sworn statement of the Bankrupt, attached to the debt of the Swofford Bros. Dry Goods Co., listed in their schedule A. of Liabilities to their Petition in Bankruptcy, filed July 3rd, 1905—which petition in Bankruptcy is filed herewith as Exhibit A, and did not rely upon any representations made by Mr. Ellis, the attorney for the Intervenors.

61 T. A. Bryant, Trustee, being duly sworn, testified as follows:

Q. You were the Receiver in this case, were you not?

A. Yes sir.

Q. And as such you signed the stipulation, with Mr. Ellis as representative of the Swofford Bros. Dry Goods Co. in this case? A. Yes sir.

Q. State if by virtue of that stipulation you obtained possession of the goods, notes and accounts referred to in the stipulation?

A. They were turned over to me. I don't know whether it was the agreement or not, I got them.

Q. You did not get them until you signed the stipulation, did you? A. No sir.

Q. You demanded them before, did you not? A. Yes sir.

Q. They were not turned over to you until after the stipulation had been signed were they? A. No sir.

Q. As Trustee, did you sell the goods or offer for sale the notes and accounts as received? A. Yes sir.

Q. Can you tell what price these goods sold by Swofford Bros. Dry Goods Co. brought? A. $3,135.00.

Q. Did you, at the same time, offer the notes and accounts received from Swofford Bros Dry Goods Co.? A. Yes sir.

Q. And was the amount bid about $2,000.00?

A. Yes sir.

Q. What became of the goods? Were they delivered to the purchaser of the general stock? A. Yes sir.

Q. What became of the notes and accounts? Was the bid accepted? A. No sir.

62 Q. The notes and accounts were not sold?

A. No sir.

Q. You were elected Trustee, were you not, and as such succeeded to the control of the purchase price of the goods of the estate, and the notes and accounts? A. Yes sir.

Q. Have you been collecting these notes and accounts since that time? A. Yes sir.

Q. Can you tell about how much you have collected on them?

A. In the neighboorhood of $2,400.00 or $2,500.00.

Q. Have you still some uncollected notes and accounts?

A. Yes sir.

Q. Are you still continuing your efforts to make collections? A. Yes sir.

Q. State whether or not you have kept the money received from the collection of these notes and accounts, received from the Swofford Bros. Dry Goods Co. separate from the other funds?

A. I keep a separate account, but the funds are in the bank in one account.

Q. Your books, then, show specifically and separately the proceeds of the sale of the goods and the notes and accounts

delivered to you by Swofford Bros. Dry Goods Co. under this stipulation? A. Yes sir.

Q. Did you, after the execution of the stipulation, or have you at any time offered to return the goods, notes and accounts received from them, back to Swofford Bros. Dry Goods Co., and have you at any time, offered to turn over to them the proceeds of the sale of the said goods, and the amount collected on said notes and accounts, and the uncollected notes and accounts?

A. Have never been asked to turn it over, and have never offered to turn it over.

63 Q. Did you get back any property on any of these notes or accounts received from Swofford Bros. Dry Goods Co.?

A. I would have to look on my books to know whether they were from Swofford Bros. Dry Goods Co. There were two lots of hats that I got back. I have never examined them because I have no way for safe keeping.

Intervenors Rest.

E. M. Newton, first being duly sworn, testified as follows:

Q. Your name is E. M. Newton? A. Yes sir.

Q. When did you begin business at Lewisville?

A. About twelve years ago.

Q. When did you begin a wholesale business there?

A. Four years ago.

Q. How long have you been buying goods from Swofford Bros. Dry Goods Co.?

A. Six or seven years. I don't know just exactly how long.

Q. You bought from them through Leo Krause for several years past? A. Yes sir.

Q. What kind of merchandise did you carry in your wholesale stock at Lewisville?

A. We carried gents furnishing goods, notions, clothing, millinery, were about the principal lines.

Q. Did you also run a retail business at New Lewisville?

A. Yes sir. We were interested in the Lewisville Supply Co., but did not run a ratail business in our own name until recently.

Q. You and your cousin were conducting a retail business at Lewisville under the firm name of the Model Furnishing Co., were you not?

64 A. Yes sir, it was owned by E. M. Newton & Co.

Q. Were the goods that you bought from Swofford

Bros. Dry Goods Co. purchased for the firm and under the name of E. M. Newton & Co.? A. Yes sir.

Q. State where the contract of July 20th, 1904, between E. M. Newton & Co. and Swofford Bros. Dry Goods Co. was signed? A. In Kansas City, in Swofford's office.

Q. Had you, previous to that time, been purchasing on general account, without any contract? A. Yes.

Q. Did you keep a copy of the contract? A. Yes sir.

Q. The other copy was kept by Swofford Bros. Dry Goods Co.? A. Yes sir.

Q. This contract was not placed on record, was it?

A. Not that I know of.

Q. Had you also been buying goods from other wholesale firms prior to July 20th, 1904? A. Yes sir.

Q. Have you also bought from other firms, wholesale firms, since July 20th, 1904? A. Yes sir.

Q. State whether the goods which you bought from Swofford Bros. Dry Goods Co., since July 20th, 1904, have been placed in the same stock with the goods purchased from other wholesale firms? A. They have.

Q. State whether or not you kept the accounts of goods which you purchased from the Swofford Bros. Dry Goods Co. separate when you made sales to your customers, from the sales for goods you had bought from other creditors?

Counsel for Intervenors enter an objection to that question because the witness would be estopped to dispute this proposition.

65 This objection was overruled by the Referee, because the leading witness for Swofford Bros. Dry Goods Co. introduced the question of the notes and accounts into the testimony, and for the further reason that the Trustee has the right to inquire into the same.

A. We sold a bill of goods, and part of the goods were shipped of Swofford Bros. Dry Goods Co.'s goods, and part from goods bought from other firms. We did not keep a separate account.

Q. State whether or not you carried the goods you purchased from Swofford Bros. Dry Goods Co., and sold them in the same manner that you sold the goods purchased from other firms?

A. We did keep them and sell them the same way.

Q. Is there any way, from an examination of your books, to find what part of a particular account is the proceeds of

goods purchased by you from Swofford Bros. Dry Goods Co.?

Counsel for Intervenors objects, which objection was by the Referee overruled, for the same reason as above given.

A. No way on earth that I know of.

Q. Did you turn over to Mr. Moore, the representative of Swofford Bros. Dry Goods Co., certain notes, claimed in the Intervention here, aggregating $1,684.32; and certain accounts aggregating $8,277.04; on the 30th day of June, 1905?

A. I did.

Q. State how these accounts were selected on your books for the purpose of being turned over.

A. We just went through and picked them out. Picked out what was considered the better class of them, the newest accounts. This was done by Mr. Moore and myself, and maybe Mr. Krause was there part of the time.

Counsel for the Intervenors enters an objection to this question and answer, which objection was overruled.

Q. State whether or not these notes and accounts represented solely the purchase price of goods which had been bought by you from Swofford Bros. Dry Goods Co.

66 A. Certainly they did not altogether. That would not have been possible.

Counsel for the Intervenors enters an objection to both question and answer, which objection is by the Referee overruled.

Q. State whether or not you told Mr. Moore that these notes and accounts did in fact represent the purchase price of goods bought from Swofford Bros. Dry Goods Co.

A. Certainly I did not.

Counsel for the Intervenors object to question and answer, because it tends to contradict the written statement of the witness. Objection was overruled by the Referee.

Q. What line of goods, Mr. Newton, did you carry in your wholesale business?

A. Ladies and gents furnishing goods; notions; clothing; millinery; were the principal lines.

Q. Did you buy any clothing from Swofford Bros. Dry Goods Co.? A. No sir.

Q. What is meant by clothing?

A. Men's suits and children's suits.

Q. Did you buy any from any one? A. Yes sir.

Q. Whom did you buy from?

A. I bought from Wyler-Ackerlane Co., Cincinnati, Ohio; from Merritt Mfg. Co., Mayfield, Ky., and Tracey Morris & Co., Philadelphia, and several others.

Q. I notice in your Schedule of Liabilities, among the creditors Wyler-Ackerlane & Co., $1,151.60; Merritt Mfg. Co., $2,017.26; Tracey, Morris & Co., $114.00. These, I understand you to say, were for clothing. State whether these accounts were contracted since July 20th, 1904?

A. Yes, they were.

67 Q. Were these goods put in stock just as the other goods purchased from other firms, including Swofford Bros. Dry Goods Co.?

Counsel for the Intervenors enters an objection to that question on the ground that it is not within the issues, and further makes a general objection to the testimony of this witness being heard, because of the answer presented by the Trustee to the petition in the Intervention filed by Swofford Bros. Dry Goods Co., does not state any defense, or any facts sufficient to constitute any defense in the matter.

This objection was by the Referee overruled, for the same reason as given above.

A. They were.

Here the attorneys for the Trustee introduced into evidence the original Petition in Bankruptcy, together with the Schedule of indebtedness of different parties.

Counsel for the Intervenors objects to the evidence as immaterial and incompetent, which objection was overruled by the Referee.

Q. Did you state to Mr. Moore, in Kansas City, at the time this contract was signed on July 20th, 1904, that you did not expect to carry any goods in stock except what you had bought from his firm, aside from millinery?

A. I did not.

Q. State whether Mr. Hanna, the adjustor and representative of Swofford Bros. Dry Goods Co., ever went to Lewisville to your knowledge, and examined your stock, after the contract of July 20th, 1904? A. He did not.

Q. Had he ever been there before? A. He had.

Q. State whether Mr. Krause frequently dropped in there since the contract was signed, and looked at the stock.

68 A. Yes sir, several times.

Q. State whether he knew you were buying goods from other firms than Swofford Bros.? A. He did.

Counsel for Intervenors object to this question and answer, which objection was overruled by the Referee.

Q. When these goods were turned over to Mr. Moore, as agent for Swofford Bros. Dry Goods Co., state whether there were any goods turned over to him, which were not purchased from Swofford Bros. Dry Goods Co.?

A. There was a few.

Q. State to the Court what goods you can remember, if any, that were turned over.

A. There were some knee pants, ribbons, laces and small notions, and hosiery, I believe. That's all I remember right now.

Q. From whom did you purchase these pants?

A. From Herzog Dry Goods Co., of St. Louis.

Q. What did these knee pants amount to?

A. I don't remember, but I think there were about twenty dozen, and if so, they would amount to about $45.00.

Q. Have you anything whereby you could state what these other items, turned over to Swofford Bros. Dry Goods Co., that did not belong to them, amounted to?

A. No sir. I don't know what they would amount to, but I think about $450.00 or $500.00.

Q. Did Mr. Moore know that these goods were going in there?

A. Possibly he did, and possibly he did not. There was not anything said about that much.

Q. In reference to the selections that were made by Mr. Krause; was he careful and particular in selecting the goods?

A. He was very positive, and did not want any goods to go in except Swofford Bros. Dry Goods Co.'s, but at that time I did.

69 Q. Were you trying to favor these people?

A. At that time I did.

Q. How was Mr. Moore in reference to taking his own goods and in reference to those that were not purchased from Swofford Bros.?

A. He did not take anything that I told him was somebody else's goods, but there was always some things in question that Mr. Moore knew went in as his goods.

Q. What do you mean by some goods that were in question that went in as his goods?

A. For instance: There were some ribbons that had been bought from Rosenthal-Sloan Millinery Co., that was the same stock number as Swofford Bros. Dry Goods Co., and it was turned over to Swofford Bros.

Q. Did Mr. Moore know this?

A. I don't know. He knew it was the same stock number.

Q. Did he know there was any doubt about this?

A. I think so.

Q. Why do you think so?

A. I can explain that in no other way, than that I was trying to favor them at that time, and if anything doubtful came up, there was nothing said.

Q. If I understand you correctly, whenever there was a doubt that the goods were shipped by Swofford Bros. Dry Goods Co., the doubt was resolved in favor of Swofford Bros. Dry Goods Co., and the goods were accordingly turned over to Swofford Bros. Dry Goods Co.? A. Yes sir.

Q. Did Mr. Moore act on that theory, or simply you?

A. It's as I told you before. We did not have any understanding of that kind, but it was mutually understood, without any agreement, is about the only way I can explain it.

Q. In regard to the accounts that were turned over, is there any way for you to approximate the proportion
70 that they represented of the purchase price of the goods bought from Swofford Bros. Dry Goods Co to the other creditors?

Counsel for the Intervenors enters an objection, which objection was overruled.

A. There was no way. No sir. The only way it could be done, might be in proportion to the amount of goods we bought from them compared to the amount we bought from other people.

Q. Did you turn over all your accounts to these people?

A. I did not.

Q. How much of your accounts did you retain?

A. I don't remember how much.

Q. What was the approximate of your liabilities at the time of this bankruptcy.

Counsel for the Intervenors object to this question as im

material and not within the issues, which objection was by the Referee overruled.

A. About $30,000.00.

Q. The amount of Swofford Bros. Dry Goods Co.'s claim, I believe, as you have put down here was about $13,310.00, was it not? A. $13,310.56.

Q. You stated awhile ago that you were trying to favor the Swofford Bros. Dry Goods Co. when this deal came up. Please state why you were trying to favor them.

A. For the simple reason that I expected them to help us out of this trouble.

Q. Why did you expect it? A. That was the agreement.

Q. State what the agreement was, and who made it.

A. The agreement was with Mr. Moore, that when we got these goods separated and taken out, that he would undertake to compromise with the other creditors, and put up the money to do it with.

Q. Was there any agreement as to the amount he would offer to the creditors?

A. There was no positive agreement, but we fig-
71 ured on offering twenty-five cents.

Q. On the dollar? A. Yes sir.

Q. Was that agreement made at the time that you agreed to turn this stock over?

A. All made the same morning, yes sir.

Q. If I understand you correctly it is that Mr. Moore agreed that if you would turn this stock and notes and accounts over, he would undertake then to compromise with your other creditors by paying them as much as 25c on the dollar? A. Yes, that was the agreement.

A. Did you turn over the stock of goods on that promise?

A. Yes sir. I insisted at the time on calling in some interested parties and talking the matter over with them all together, but Mr. Moore insisted that I leave the matter in his hands and that he would engineer the matter. It is very natural that I would not have turned everything over to him for the Swofford Bros. Dry Goods Co. and left my personal endorsers, to the amount of five or six thousand dollars without anything.

Q. Was this money that you had borrowed from the banks at Lewisville, on the endorsement of these friends?

A. Yes, Lewisville and Texarkana.

Q. Were you to settle these endorsed notes yourself after you got the other debts out of the way? A. Yes sir.

Q. Now, why was this agreement not carried out?

A. I cannot answer that part of it.

Q. State what Mr. Moore did in carrying out this agreement, or in refusing to carry it out.

A. He agreed to come back at the time of the sale in bankruptcy and buy the stock, and have not heard from him any more since that date.

72 Q. Now, at the time this agreement was made, was it contemplated and agreed that you should, at that time, go into bankruptcy?

A. No sir, not when these goods were turned over. That was his advice later.

Q. It was his advice that you go into bankruptcy?

A. Yes sir, that was his advice later.

Q. Did you then proceed to go into bankruptcy?

A. Yes sir, a day or two after that. It was the Monday following that.

Q. You said something about his making a substantial promise about buying the goods in. Was there any other thing that he promised to do except buy them in?

A. Yes, he promised that if all of these things failed he would furnish us a stock of goods to go into business.

Q. Was it his promise that he buy the stock of goods in, and turn it over to you?

A. Certainly.

Q. And if he failed in that and did not get the stock, he would start you in business again? A. Yes sir.

Q. Did he keep any of these promises?

A. No sir, he did not.

Q. When you went into bankruptcy, or had your papers drawn up, where did you sign them?

A. At Mr. Webber's office.

Q. Who was present when you signed them?

A. Mr. George Webber, Mr. Searcy, and I think Mr. Ellis was there, but am not sure, and John Newton.

Q. How long after you went into the office before you signed them?

A. It was late in the evening, because we were in a rush to get them to this office. We were in a rush, and sat right down and signed them.

Q. Did you read the papers that you signed?

73 A. No sir, I did not.

Q. Was your attention directed to, or did you know

anything about the statement contained here in Schedule A. of Liabilities, to the effect that the notes and accounts which you had turned over, represented the price of goods which you had bought from Swofford Bros. Dry Goods Co.?

A. It was not.

Q. When did you know for the first time that that was in there?

A. Two or three days ago, I don't know just when.

Q. Was it when I told you that this amendment had been filed? A. Yes.

Q. Now, in making this transfer, there is a paper attached to the Intervention showing that you assigned said notes and accounts to the Swofford Bros. Dry Goods Co., and that they represented the price of goods bought by you from the Swofford Bros. Dry Goods Co. State whether you wrote this assignment? A. No sir.

Q. Did you sign that transfer, a copy of which is attached to the Intervention? A. Yes sir.

Q. Did you read it before signing it?

A. Yes sir, and if it shows that, I did not understand it that way. Does it mean for goods bought exclusively of Swofford Bros. Dry Goods Co.? I did not understand it that way.

Q. Did you, in fact, understand that you were making any representation, either written or verbal, to Mr. Moore, or any one else, that these notes and accounts were exclusively for goods bought from Swofford Bros. Dry Goods Co.?

A. I certainly did not.

Q. As a matter of fact, were they exclusively for said goods? A. They were not.

74 Counsel for the Intervenors enter an objection to this question and answer for the same reason as above given, which objection was by the Referee overruled.

Q. Do you know how much of these notes and accounts would be covered by goods which had been bought from Swofford Bros. Dry Goods Co.?

A. While there were a good many of the goods that were in those sent out that were Swofford Bros. Dry Goods Co.'s goods, there were also other goods, but just what the proportion was, I don't know.

Q. It would not be possible for you to tell?

A. No sir.

Q. Was it a large or very small proportion?

A. If I were going to estimate it, should say about one-half.

Q. That is, taking the goods all together?

A. Yes sir.

Q. But you picked out only a part of the accounts and turned them over to Swofford Bros. Dry Goods Co.?

A. Yes sir.

Q. Did you pick them out with reference to trying to find the accounts which represented the goods bought from Swofford Bros. Dry Goods Co., or the accounts which were the best you had?

A. I picked them out, and tried to give them the best I had, which is evidenced by the way they have been collecting them.

Q. Did any of your other creditors know anything about this contract that you had with the Swofford Bros. Dry Goods Co., as far as you know?

A. They did not.

Counsel for Intervenors enter an objection to question and answer, because no one could have known. This objection was overruled by the Referee.

Q. You did not tell any of them? A. I did not.

75 Q. It has been testified to, by witness for the Intervenors, that you owed Swofford Bros. Dry Goods Co., about $5000.00 when the contract of July 20th, 1904 was signed, and that the account was closed up by your giving checks, dated a few days apar. State whether this is true?

A. It is the facts. I think about $5,000.00.

Q. State whether or not these checks have been paid?

A. No sir.

Q. Can you state whether or not all these checks are included in the account of Swofford Bros. Dry Goods Co. or not?

A. I could not tell whether they were included or not. There were two of these checks for $340.00 each, which were not paid for the reason that we had bought some goods from them, for which we were to pay cash, and having to use our cash receipts to pay this, these two drafts had to be carried over.

Q. Have they ever been paid?

A. There is a question about that. I am not certain whether they have been paid or not. There are some of these drafts that came into this year. I mean the dates come into this year, and they were not due, and were placed at the end of the list.

Q. You do not know whether all of that old debt had been paid or not? A. I think it has been.

Q. It appears here that you owed, at the time this contract of July 20th, 1904 was signed, about $5000.00, for merchandise; state whether all the goods which you bought from Swofford Bros. Dry Goods Co. prior to the contract of July 20th, 1904 had been sold and disposed of, or whether any part of them were transferred to Swofford Bros. Dry Goods Co. on June 30th, 1905.

A. It would be hard to tell just what proportion of what goods we had on hand were purchased previous to that time. However, there were some.

76 Are you positive that there were some of these old goods that were turned in to Mr. Moore?

A. Yes sir.

Q. But you are not able to state how much?

A. No sir.

The testimony in this matter not being finished, the Court adjourned, to resume at 9 o'clock, August 31st.

Q. I asked you yesterday in regard to what notice, if any, had been given to your creditors, or to the commercial world of the existence of the contract between E. M. Newton & Co. and the Swofford Bros. Dry Goods Co. Will you now please state if Mr. Moore recorded, or gave notice of recording that instrument at that time it was signed by you in Kansas City.

A. There was not much said about it. The only thing was I looked to Mr. Krause a good deal in such matters and he told me—

Counsel for Intervenors enter an objection to that statement as Mr. Krause is here.

A. Mr. Moore said he would not put it on record, and would say nothing about it.

Q. Did he say anything else about what you should say about it?

A. No sir, there was nothing said about it. It was understood between us that we should say nothing about it.

Counsel for the Intervenors object to the last statement, which objection was overruled by the Referee.

Q. How was that understood?

A. From the general conversation. It was agreed between Mr. Moore and myself that the contract was not to be recorded, and that we would say nothing about the contract.

Q. You knew it would affect your credit if it was put on record or known? A. I did.

77 Did you have any conversation with Mr. Ellis after he came down to Texarkana sometime about the third of July? A. Yes sir, I did.

Q. State whether you and he talked with reference to the manner in which the accounts were kept of sales of goods which had been bought from the Swofford Bros. Dry Goods Co.?

A. He inquired regarding the accounts that I had turned over to him, and wanted to know what goods they represented, and the particulars regarding them.

Q. What did you tell him?

A. I don't know that I can give you the conversation. I outlined the same statement to him as given in my evidence yesterday, that they were not all together for goods which Swofford Bros. Dry Goods Co. had sold.

Counsel for the Intervenors enter an objection, and desire to have this stricken out, for this man should not testifiy and make his statements evidence in view of the fact that they contradict his sworn statement in the Petition in Bankruptcy. This objection was by the Referee overruled.

Q. What day of the month was that, according to your recollection?

A. The conversation with Mr. Ellis was on the third day of July, if the third was on Monday after this transaction came up.

Q. Was that about the time your papers were being gotten up for Bankruptcy? A. Yes sir.

Q. Was it before the petition in bankruptcy was filed?

A. It was.

78 On Cross Examination, witness testified as follows:

Q. If that conversation with Mr. Ellis occurred before the filing of your petition in Bankruptcy, why did you sign and swear to the statement contained in your Petition in Bankruptcy, as to the notes and accounts turned over to Swofford Bros. Dry Goods Co.?

A. I simply signed it as a matter of form and did not know what was in them.

Q. Was not the question discussed about listing the claim of the Swofford Bros. Dry Goods Co. among your liabilities, and did your attorney, and the others present, including Mr.

Ellis, not consider that question about whether you would list the Swofford Bros. Dry Goods Co.'s claim or not?

A. I think it was discussed. I had not much interest in the discussion, because I was not in the room much of the time.

Q. Did not Judge Ellis insist that the claim of the Swofford Bros. Dry Goods Co. should be listed, and insist that an explanation of all the facts connected with it should be attached to it? A. I don't know.

Q. Were you not present at that time?

A. Not when he was insisting on such a thing as that, no sir.

Q. Did you not understand in listing the Swofford Bros. Dry Goods Co.'s claim that you attached an explanation to it, as to what had occurred in connection with it?

A. You mean in our schedule and list? I don't know anything about it, as I merely signed it as a matter of form, and did not know what was in any of the papers.

Q. Do you mean to say that you signed and swore to your schedule of assets and liabilities without knowing what was in the papers?

A. To a certain extent. Yes sir, it was in the hands of our attorneys. These papers were prepared in your office and the figures, as far as the assets and liabilities, were taken from the books.

79 Q. From whose books? A. From our books.

Q. What do you mean by our books?

A. The books of E. M. Newton & Co.

Q. Now, after considering the question and listing the Swofford Bros. Dry Goods Co.'s claim, and attaching the explanation to it, did you not go out to get from your books, the actual figures that were contained in the explanation?

A. I went out to get the figures from our books to accommodate Mr. Ellis, not the figures contained in that explanation, but figures showing the amount of merchandise sold us since the signing of this contract.

Q. Is it not a fact that Mr. Ellis did not have with him the statement of the debits and credits of your account, and that you went out and got these figures for him, at his request, for the purpose of putting them in that explanation?

A. I went out and got these figures for Mr. Ellis, as he wanted to know how much merchandise Swofford Bros. Dry Goods Co. had sold up, and how much we had paid them since the signing of this contract of July 20th, 1904.

Q. Where did the conversation occur that you spoke of

having with Mr. Ellis in which you stated to him that the notes and accounts were not the proceeds of the sale of Swofford Bros. Dry Goods Co.'s goods?

A. I did not make that statement. They were the proceeds of part of Swofford Bros. Dry Goods Co.'s goods.

Q. Where did the conversation occur?

A. I think when in our office and when in Mr. Webber's office.

Q. State what you said to him?

A. I can not state that, but I have stated the sense of it.

Q. Who was present and heard that conversation besides you and him?

A. I don't think there was any one, not that I remember However, this matter was discussed between Mr. Moore and myself, Mr. Ellis and myself, Mr. Krause and myself,
80 and Mr. George Webber.

Q. Tell us now whether these different conversations occurred, and who was present.

A. I could not tell you where these different conversations occurred, or who was present.

Q. You say that you had two conversations with Mr. Ellis, one in your own office, and one in the office of Webber & Webber. Was the conversation the same in each case?

A. I had several conversations with Mr. Ellis. I don't know that they were identical, but they were along the same lines.

Q. What was the occasion or necessity of having several conversations with Mr. Ellis on these matters?

A. I could not tell you. I did not broach the subject either time.

Q. In what business are you at present engaged?

A. Manager of the Texarkana Mercantile Co.

Q. Who comprise the Texarkana Mercantile Co.?

A. Gus Oppenheimer has 100 shares; W. J. Mansfield has one share and E. M. Newton has one share.

Counsel for the Trustee objects to question and answer on the ground that they are leaving the case. This objection was by the Referee sustained.

Q. What connection have Oppenheimer and Mansfield with the Roesenthal Sloan Millinery Co.?

A. Gus Oppenheimer is bookkeeper, and Mansfield is one of the managers.

Q. Who bought the stock of goods at your bankruptcy sale? A. Swofford Bros. Dry Goods Co.

Q. Who bought the millinery department?
A. Swofford Bros. Dry Goods Co.
Q. Who bought it from them?
A. A man by the name of Haskell.
Q. What connection has he with the Rosenthal Sloan Millinery Co.?
81 A. One of the stock holders, I think.
Q. Was he not acting for the Rosenthal Millinery Co.?
A. He was in a sense, I suppose. I suppose he was acting for me, undertaking to be our friend in the matter and wanted to buy it, so I could have something to do.
Q. Was not that stock bought in by agreement made between you and the Rosenthal Sloan Millinery Co.?
A. Certainly, I was one of the stock holders, and expected to be manager.
Q. Was it not understood and agreed that the Rosenthal Sloan Dry Goods Co. would buy a millinery stock and put you in charge of it as manager, and after paying the purchase price of the stock you should be the owner of the same?

Counsel for the Trustee enters an objection to that question, as it cannot possibly have any bearing on this case, which objection was by the Referee overruled, and the witness answers the question.

A. Yes, they said if we could make enough money to pay for the stock it was to be mine.
Q. Was it not agreed that if any dividends obtained by the Rosenthal Sloan Millinery Co. out of your bankruptcy should be applied as credits towards the purchase price?
A. No sir.
Q. You say it was not?
A. No sir, not towards the purchase price.
Q. Was not this agreement that the Rosenthal Sloan Millinery Co. having bought the millinery stock for $1500.00, the stock was to be yours after you had paid them $4500.00, which would be receiving $3000.00 on their claim against you, and that against that there was to be credited whatever dividends were received by them in your Bankruptcy?
A. The agreement was, when they turned this stock over to me as manager, and gave me one share of stock in it, that they would take the other stock between the difference in price got for the bankrupt stock, and hold same un-
82 til I was able to buy it back from them, at which time I would own the business.
Q. You have not answered whether in buying that busi-

ness, the price was to be credited by whatever dividends they received from the Bankrupt Court on their indebtedness against you?

A. The price was not to be credited with anything, only what I could manage to pay them.

Q. You did not answer about the price. State what the price and the terms were?

A. I think the price was $1500.00, and the terms cash.

Q. Perhaps I have not stated the question correctly. I will ask you if you did not agree with the Rosenthal Sloan Millinery Co. acting through their representative, as you have stated, to pay them $1500.00 for the stock of millinery and agree to pay them $3000.00 in addition thereto, which $3000.00 was to be credited by their dividends received in bankruptcy, or upon receipt by them of the $4500.00, then the stock would be yours? A. I did not.

Q. Did you not, within two or three days, or a very short time after the bankruptcy sale, or a short time or a few days there after, tell Mr. Leo Krause that this was the arrangement between you and the Rosenthal Sloan Millinery Co., whereby they would put you back in business?

A. I did not.

Q. You stated in your examination, that there was no way on earth to determine what part of your notes and accounts represented the sale of Swofford Bros. Dry Goods Co.'s goods. State what books you kept, and what is your book of original entry, showing the items of all invoices sold by you?

A. The first part of that question is wrong, for I qualified that statement by saying that it could be told by the proportion of goods received from Swofford Bros. Dry Goods
83 Co. from the proportion received from other people.

Q. That, I understood you to say, would be about half of your notes and accounts? A. I think so.

Q. Now, I ask you what book of original entry you kept that shows the items of any invoices or goods sold by you?

A. Do you mean to ask that you want to know in what book we kept an itemized list of the items?

Q. (By the Referee.) He means to ask whether you ke[e]p a day book or a blotter to show the items sold to your customers?

A. We did not keep a day book, but kept copies of the invoices in a copy book, charging each customer in the journal.

Q. Where are your copy books showing these copies?

A. Among a lot of books in my possession at the Texarkana Mercantile Co.

Q. Can you tell from these invoices, copies of which you say you have, what goods were Swofford Bros. Dry Goods Co.'s goods?

A. I could if I had plenty of time to do it in, to trace the stock numbers, etc.

Q. Now, you spoke in your direct testimony, of about twenty dozen knee pants which had been delivered among a lot of goods to the Swofford Bros. Dry Goods Co., and which were not goods bought from them. Did you not state to Mr. Krause, in the presence and hearing of Mr. Moore, that that lot of knee pants was a job lot bought by you from Mr. Powell, their salesman in charge of that line, and that you knew that they were Swofford Bros. Dry Goods Co.'s goods.?

A. I did not.

Q. Did not Mr. Krause ask you if you were sure enough of it to be able to swear to it? A. No sir.

84 Q. And did you not answer that you could?

A. I did not.

Q. Mr. Newton, is not this the original inventory of the goods which you delivered to Swofford Bros. Dry Goods Co.?

A. It appears to be the same, yes sir.

Q. Did you not call out every item in that inventory?

A. No sir. I did call out part of them and Mr. Krause called out most of them.

Q. Did you not call them out and Mr. Krause put them down as you called them? A. Yes sir.

Q. Now then, did Mr. Moore have anything to do with that except to make the extensions and footings as you got through with each sheet?

A. No, I think not:

Q. I want you to point out in that inventory, and make a mark against each item, what you say is not Swofford Bros. Dry Goods Co.'s goods?

Witness is permitted to take the inventory for the purpose of examination, and is directed by the Referee to make a list showing the items and amounts thereof.

Q. Was the agreement between you and the Rosenthal Sloan Millinery Co. in writing or verbal?

A. What agreement do you refer to?

Q. As to the purchase by you of the stock of goods.

A. They simply bought this stock of goods, and put me in charge as manager.

Q. Have you a contract or agreement with them in writing, or with any one in writing, in regard to that stock?

A. No contract or agreement.

Q. Neither verbal nor written?

85 A. I have stated that when I could pay for the stock of goods it was to be mine, if that makes an agreement.

Q. Is that in writing?

A. It is not.

Q. You stated on yesterday, that Mr. Krause was very positive that he did not want anything included in the lot of goods delivered to Swofford Bros. Dry Goods Co. except the goods sold you under their contract of July 20th, 1904.

A. I did not make that statement. I did not say under the contract of 1904. He was very positive and very careful not to take any goods not sold by Swofford Bros. Dry Goods Co.

Q. Was not Mr. Moore equally positive?

A. He was not.

Q. Did not Mr. Moore repeatedly say that he did not want anything included that was not their goods?

A. I have no recollection of such statement.

Q. I direct your attention particularly to a lot of hosiery which you left among the goods Mr. Krause insisted was not Swofford Bros. goods, did you not say that that was all right, and that there was nothing on the hosiery to show that they were not Swofford Bros. Dry Goods Co.'s goods, and did not Mr. Moore, then and there, say that if there was any question about them, he wanted them moved out and would not take them?

A. Mr. Moore did not say anything about it, but Mr. Krause insisted that they be moved out.

Q. Mr. Moore was present was he?

A. I don't remember. He was in the house, but I don't think he was present.

Q. Was not Mr. Moore present and assisted in taking the inventory and in separating the goods and in moving them?

A. He was, helped move them, and assisted on the inventory inasmuch as footing the sheets as they were taken.

Q. He could have heard whatever passed in con-

86 nection with the goods, between you and Mr. Krause?

A. Part of the time he could, and part could not.

Q. Was that hosiery included in the Swofford Bros. Dry Goods Co.'s goods?

A. This special lot you refer to was taken out.

Q. You say that it was Mr. Krause's instructions?

A. Yes sir.

Q. After the goods had been delivered, did you not call Mr. Moore to one side and propose to him to give you $500.00 to stand by Swofford Bros.?

A. No sir, but he told me he would give me several hundred dollars if I turned over to him the goods, when I told him I was penniless and did not have anything left. That was the substance of that.

Q. Did you not urge Mr. Moore several times to give you the money because of your friendliness to Swofford Bros. Dry Goods Co.? A. I certainly did not.

Q. Did you not finally get down to a proposition of $100.00 in the same connection?

A. No sir, neither $100.00 nor $500.00, nor one cent.

Q. Did you not repeatedly importune Mr. Leo Krause to go to Mr. Moore and get Mr. Moore to give you money or help you?

A. I requested Mr. Krause once or twice to go and get Mr. Moore and see if we would not carry out his contract, in some part, at least, but he told me he did not think he would, as he had asked him to give him one or two notes, which the estate owed him, but Mr. Moore declined to do that.

Q. You say that Mr. Moore agreed to buy the goods at the Bankruptcy sale, and turn them back to you to start you up in business?

A. That was not the beginning of it. He agreed to undertake to effect a compromise with all our creditors, and in that manner turn the business back to us. Afterwards, his advice was for us to go into bankruptcy, and he would buy a part, or all of the goods and turn them back to us, and
87 if that could not be done at the right kind of a price he would furnish us with new merchandise, to open up business.

Q. Who was present at any such conversation as that?

A. Mr. Krause was present at part of it, and it was understood that there could be no positive trade made, that it might bring trouble in this very law suit today, but the positive understanding was as I have stated.

Q. Was any one else present except Mr. Moore and Mr. Krause and yourself?

A. When I talked over these matters? I don't think there was.

Q. You make a distinction in your answer between an agreement and an understanding; did you make the same distinction in regard to your discussion with the Rosenthal Sloan Millinery Co.

A. I don't know what you intend to imply by that question, or intend to ask. It was like this between Rosenthal Sloan Millinery Co. and me, as fast as I could take up this stock, I expected to do so.

Q. As fast as you can take up this stock, what do you mean? A. As fast as I can pay $100.00 per share.

Q. A hundred dollars per share? You mean take up 50 shares at $100.00 each?

A. I would have to pay that for the goods if bought at present, yes sir.

Q. Now then, do the dividends received by the Rosenthal Sloan Millinery Co. in this bankruptcy, apply as part of that?

A. No sir.

Q. Do the dividends in bankruptcy received by the Rosenthal Sloan Millinery Co. have anything to do with the business of which you are now manager? A. They do not.

Q. You state that Mr. Moore has refused to assist you in your business, have you not asked Mr. Krause several times, to importune Mr. Moore to sell you goods, and Mr.
88 Moore has refused, since your bankruptcy?

A. That is not a fact. I have asked Mr. Krause and Mr. Hanna, the day this stock was turned over to me, to ask Mr. Moore if they would give us a line of credit of $1500.00. Mr. Krause and Mr. Hanna said that they had a telegram from Mr. Moore stating that he would, if every thing could be fixed satisfactorily. He has not refused because I have not asked him for any time.

Q. Have you not since that time written to Mr. Moore, asking him to let you have goods, and he refused?

A. I have not written Mr. Moore asking him to let me have goods. I did write him just simply to see what he would say, to let us have a line of samples, from which we might sell goods, and he refused to do that.

Q. In that letter, did you call Mr. Moore's attention to, or refer ——

Counsel for the Trustee enter an objection, as the letter will speak for itself, which objection was sustained by the Referee.

Q. Have you an impression copy of that letter?

A. Yes sir.

Q. Will you attach a true copy of that letter here in your deposition? A. Certainly.

Q. In making the effort to get goods from Mr. Moore, did you refer to any contract with him, or agreement to furnish you goods? A. I did not.

Q. If you had such an agreement, why didn't you?

A. I have never made any effort to get goods from Mr. Moore, except the time I asked Mr. Krause and Mr. Hanna to give us a line of credit of $1500.00 He was not present at this time, and we have never asked them for anything since this time, except for this sample line, which I needed at that time. That is what you have been trying to bring out. This was in the letter.

89 Q. If you had any agreement with Mr. Moore about furnishing you goods, why did you not mention it to Mr. Krause or Mr. Hanna, or in your letter to him.

A. Because Mr. Krause was thoroughly conversant with all of the facts of the whole thing, and it was not necessary to call his attention to any special agreement.

Q. Mr. Krause, then, you say, knew that Mr. Moore had made the agreement that you speak of? A. Certainly.

Q. Were these agreements made in Mr. Krause's presence?

A. Some of them were, yes sir. Some were talked over in his presence.

Q. When and where was that?

A. While Mr. Moore was here, and most of that was talked over in our office.

Q. Was that before or after the delivery, by you, to them, of the Swofford Bros. Dry Goods Co.'s goods?

A. Before and after.

Q. During the time that you were in business, did you keep a correct set of books?

A. As near as I knew how.

Q. Did these books show your assets and liabilities?

A. I think so.

Q. Did you render to the Swofford Bros. Dry Goods Co., and for the purpose of obtaining credit of them, or to Mr. Moore, their credit man, statement of your business at different times, showing your condition, both before, at the time, and after the execution of the contract of July 20th, 1904?

A. I made them statements, before, at the time, but never since.

Q. Were these statements oral or in writing, or both?

A. In writing.

Q. Since July 20th, 1904, state if you have not talked with Mr. Moore, in Kansas City, when you were there,
90 about your financial condition?

A. Yes sir, once.

Q. When was that?

A. In January or February, I don't know which.

Q. What year?

A. 1905. I made no statement though.

Q. At that time was your statement to Mr. Moore about your assests and liabilities true?

A. It was, as far as I knew.

Q. The statement of February, 1904, made by you, in writing, to the Swofford Bros. Dry Goods Co., was that true or false?

Counsel for the Trustee objected to this question, and the objection was sustained by the Referee.

Q. I hand you a statement of Feb. 1st, 1904. State whether or not you made that to Swofford Bros. Dry Goods Co.? A. Yes sir.

Q. Is that statement true or false?

A. True, to my knowledge and belief.

Q. Who signed that statement? A. I did.

Q. Where was it made out? A. In Kansas City.

Q. Was this statement made in Kansas City for the purpose of obtaining credit from Swofford Bros. Dry Goods Co.?

A. It was.

Q. Was credit obtained on this? A. Yes.

Q. Now, after Mr. Moore came to Texarkana, the latter part of June, did he not ask you to look at your ledger, and did you not refuse when he asked you to let him do so?
91 A. I did.

Q. Did you not then present to him a statement of your assets and liabilities, which showed you to be abundantly solvent? A. I did not.

Q. Have you got that statement that you made?

A. I did not make any.

Q. Did you not put Swofford Bros. Dry Goods Co.'s statement in figures? A. I did not.

Q. What I refer to is the statement which purported to be a trial balance from your books. Did you show such paper to Mr. Moore? A. I think I showed him a trial balance.

Q. Have you got that trial balance? A. I have not.

Q. What became of it?

A. I cannot tell. I think Mr. Moore has it.

Q. Did you not retain it as your trial balance as part of your papers in the office?

A. No sir. I don't know whether it was left in the office or not. Have not seen it since this trouble came up, as it came up about that time, and I don't know what became of it. Have not seen it since.

Q. Did not that trial balance show your assets to be in excess of your liabilities?

A. I could not tell you. That's what we were trying to find out. Mr. Moore and myself were working on it, and wanted to find out.

Q. Did not Mr. Moore insist upon seeing your ledger for the very purpose of endeavoring to ascertain your condition?

A. He did, and I refused because I did not think he had any business seeing it.

Q. Did you not, that same night, tell Leo Krause that you had been making false statements to Swofford Bros. and admit to him that your representations to Mr. Moore
92 that day had been untrue?

A. I told Leo Krause that night, that I had misrepresented things to Mr. Moore that evening, for the purpose of holding things off until Mr. Krause got here, and then I told Mr. Krause the true state of affairs, as I considered him my friend.

Q. Did you not, after the delivery of these goods to Swofford Bros. Dry Goods Co. admit to both Mr. Moore and Mr. Krause, that you had been misrepresenting your condition all along to Swofford Bros. Dry Goods Co.?

A. I certainly did not.

Here the attorneys for Swofford Bros. Dry Goods Co. file in evidence the statement of February 1st, 1904, referred to in the foregoing examination, and same is marked Exhibit C.

On Re-Direct Examination, witness testified:

Q. You referred to your conversation with Mr. Moore when he came down here about the 30th of June, 1905, and stated that you did not give him the full facts in reference to your business, because you were waiting for Leo Krause to come in. State whether Leo Krause came in the same night of that day? A. He did.

Q. State whether you told Mr. Krause the true condition of affairs? A. I did.

Q. Did your statement to him show that your firm was insolvent? A. It did.

Q. Did you and Mr. Krause then let Mr. Moore know of this condition?

A. We did. The next morning.

Q. Did you then keep Mr. Moore and Mr. Krause from examining the books of your Company? A. I did not.

93 Q. Did they, or either of them get the books and look at them?

A. I think we commenced that evening selecting the goods that were turned over to them.

Q. When you were selecting the accounts, did Mr. Moore have access to all your books and papers?

A. Yes, everything he called for.

Q. Did you select the goods on the day that you had told Mr. Moore of your true condition?

A. I did, I helped to do it.

Q. Then Mr. Moore and Mr. Krause were apprised of your true condition and that was that you were insolvent at the time these goods, and notes and accounts were turned over to them? A. They were.

Q. What notation, if any did you make on these accounts as you would come to them on the ledger, in reference to assigning them to Swofford Bros. Dry Goods Co.?

A. (Witness here refers to the ledger and then says): We endorsed on each account in the ledger the following: "Assigned to S. Bros." There may be some of them a little different.

Q. You did not tell the dates, amounts, and time due?

A. We just gave names and addresses.

Q. Did the ledger show, or could it be easily ascertained from your books, the dates, amounts, of each charge against each customer to whom you had sold these goods?

A. Our ledger shows plainly the date which each bill was charged.

Q. Now, you have referred to an understanding which you say existed between you and Mr. Moore, in regard to what he should do for you if these goods and accounts were turned over, please state distinctly what his agreement was with you at the time these goods were turned over to them.

A. That he would merely undertake to effect a compromise with all our creditors, and then put us back in business.

94 Q. Please state whether anything was said by Mr. Moore at that time with reference to selecting and separating these goods that he claimed from the bal-

ance of the stock, and what influence, in any, that would have upon other creditors in accepting a small compromise.

A. He wanted to get them separated as quickly as possible, and thought it would have the effect of tangling up affais so as to get a compromise on a low basis.

Q. Now, in the event he was unable to make the compromise, state whether he agreed to do something in reference to re-establishing you in business.

A. He did, to the extent that if all other arrangements failed he would furnish us with new merchandise.

Q. You state that substantially, Mr. Moore advised you to go into Bankruptcy? State when that occurred.

A. The second day he was here. After the goods were turned over to him.

Q. Was that before he went back to Kansas City?

A. Yes sir.

Q. Did you at once take his advice or wait?

A. In answering this question will qualify the last one just a little. Mr. Moore advised us to go into Bankruptcy, but preferred to wait until he could go to Kansas City, and let Mr. Ellis come down and give further advice in the matter, is the reason why I did not immediately go into Bankruptcy.

Q. Did Mr. Moore agree to be here, or have some one here, to carry out his agreements with you on the day of the sale of the Bankruptcy stock?

A. Agreed to be here himself.

Q. Did he come? A. He did not.

Q. Did he send any one who proposed to carry out his understanding or agreement with you?

95 A. He certainly did not send any one who proposed to carry out his agreement with me. He did send some one.

Q. Whom did he send? A. Mr. Hanna.

Q. I believe you stated Mr. Hanna bought in the stock?

A. He did.

Q. State what you asked Mr. Hanna the day he purchased the stock of merchandise?

A. The first thing I asked him to do was to turn over the stock of millinery which was sold separately, to Mr. Haskell at the same price he had bought it for. Mr. Haskell was to buy it, and place me in charge of it. Mr. Hanna refused to do that without charging him a profit of $200.00. The second thing I asked him to do was to secure a line of credit from Swofford Bros. Dry Goods Co., which I explained before.

Counsel for the Intervenors enter an objection to both question and answer, for this reason, as Mr. Hanna is not here, this is absolutely immaterial in the present issues. This objection was by the Referee overruled.

Q. Did Mr. Moore carry out his agreement in regard to giving you a line of credit? A. He did not.

Q. What did he do with the stock of merchandise, aside from the millinery?

A. Boxed it up and shipped it to Kansas City, I suppose.

On Re-Cross Examination, witness testified:

Q. At the time you were preparing your Bankruptcy papers, did you not ask Mr. Krause to arrange the matter and delay it so that you could remain in charge of the stock for two or three days, so as to protect yourself and get something out of it?

A. I did not, but I did insist with Mr. Moore that I also have called in some of my larger creditors, and some
96 of my personal friends, who were endorsers, and have them all come here and talk the matters over together, and he refused.

Q. My question was directed to the time after you had turned over the goods, notes and accounts to Mr. Moore, for Swofford Bros. Dry Goods Co., and after you had consented to go into Bankruptcy. Now, at that time, did you not ask Mr. Leo Krause to delay the matter so that you could get enough goods to give yourself something to go on?

A. I certainly did not at that time or at any other time.

Q. In speaking of your having agreements or arrangements with Mr. Moore, about what he would do, did you mention any of these things to Mr. Ellis when he came down to succeed Mr. Moore in the matter?

A. No sir, I did not. I talked with Mr. Krause in the matter. I considered him nearest to me and my affairs.

John F. Newton, after being duly sworn, testified as follows:

Q. Is your name John F. Newton, a member of the firm of E. M. Newton & Co.? A. Yes sir.

Q. What is your age? A. Forty-two.

Q. How long have you been in the mercantile business?

A. About 12 years.

Q. At what place? A. Lewisville, Arkansas.

Q. When did you become a member of the firm of E. M. Newton & Co?

A. I don't remember exactly, but something like ten or eleven years ago.

Q. Is E. M. Newton related to you in any way?

A. Second cousin.

Q. You and he have been partners for ten or eleven
97 years? A. Yes, something like that.

Q. How long has the firm been engaged in the wholesale mercantile business?

A. Something like four years.

Q. What part of the business did you have in hand?

A. Part of the time, in fact the majority of the time in connection with it, and I was there, and part of the time I was on the road.

Q. Did you have anything to do with the wholesale departments?

A. Not very much, except that I was on the road; though I assisted occasionally there, was back and forth there and in the retail store. I did not stay there regularly.

Q. Did the firm of E. M. Newton & Co. keep its business separate and distinct from the retail business.

A. They did not.

Q. Were the same set of books used in both the retail and wholesale business? A. Yes sir.

Q. What was the style of firm name of the retail business?

A. E. M. Newton & Co. We had another business aside from that which was in a different building, the Model Furnishing Co.; that business was all done through E. M. Newton & Co.'s place of business up the street, and kept in the same books.

Q. E. M. Newton & Co. were doing a wholesale business, and a retail business?

A. Yes sir.

Q. At the same time they owned a retail business known as the Model Furnishing Co.? A. Yes sir.

Q. You were in charge of the retail department of E. M Newton & Co. part of the time, and part of the time on the road? A. Yes sir.

98 Q. When did you quit the retail business?

A. I don't remember exactly, sometime last fall.

Q. The business then continued as E. M. Newton & Co., wholesale? A. Yes sir.

Q. You have heard the testimony of some of the witnesses, and understand that it is claimed that there was a contract between E. M. Newton & Co. and Swofford Bros. Dry Goods Co. which was made on the 20th of July, 1904. I hand you

what purports to be a copy of that contract. When did you for the first time, know that such a contract existed?

A. I did not know until after the failure.

Q. Were you a partner in this firm of E. M. Newton & Co.?

A. Yes sir.

Q. What interest did you have in it?

A. I had a half interest?

Q. And you say that you knew nothing about that contract until after the failure?

A. No sir, I didn't know about it.

Q. State to the Court whether goods were bought by E. M. Newton & Co. on credit from various other firms in the different cities of the country? A. Yes sir.

Q. How many firms, approximately, did your Company buy goods from?

A. I don't know as I could say exactly, a good many though.

Q. The different firms as mentioned in this schedule as attached to your petition in Bankruptcy? A. Yes sir.

Q. Did you examine the list of creditors as set forth in this petition in Bankruptcy? A. No sir, I have not.

Q. I have reference to the list of accounts that the firm owes.

99 A. No sir, I have never examined it, in fact, I have never seen it at all except in the afternoon the assignment was made. Have not been over here; never came over to Texarkana.

Q. I notice your name is signed to the Petition in Bankruptcy here, in one or two places, and to the exhibits attached to it. State when and where you signed these papers.

A. At Mr. Webber's office.

Q. What day? A. The day the assignment was made.

Q. You mean the day the Petition in Bankruptcy was filed? A. Yes sir.

Q. Did you read these papers over when you signed them?

A. No sir.

Q. You can read, can you not? A. Yes sir.

Q. Why did you not read it?

A. I thought it was merely a matter of form and that it was all right.

Q. You understood it, merely to be the necessary papers to go into Bankruptcy? A. Yes sir.

Q. Now, in Schedule A., following the description of the claim of Swofford Bros. Dry Goods Co. appears this language: "and certain notes aggregating the sum of $1,684.32,

and certain accounts aggregating $8,277.04, due and payable to us for goods of the said Swofford Bros. Dry Goods Co." Please state whether you knew that that language was contained in these bankruptcy papers at the time you signed this Petition in Bankruptcy? A. No sir.

Q. In regard to the goods which were bought from Swofford Bros. Dry Goods Co. and other creditors by E. M.
100 Newton & Co., state whether these goods were placed in one stock or not, or carried as one stock of merchandise?

A. Yes sir, they were. Everything was bought for E. M. Newton & Co., whether it was bought for the retail department of the wholesale department, went to the wholesale department first, and then to the retail. This is true of everything that was bought.

Q. Were the goods which were purchased from Swofford Bros. Dry Goods Co. kept separate and distinct from the goods bought from other creditors?

A. No sir, they were not.

Q. In making sales of goods, was any distinct and separate account kept of the goods that had been obtained from Swofford Bros. Dry Goods Co. from the sales of goods obtained from other wholesale houses? A. No sir.

On Cross Examination, witness testified:

Q. Did I understand you to say that you were unable to distinguish the goods from Swofford Bros. Dry Goods Co. from those bought from other wholesale houses?

A. From my own knowledge, I don't suppose I could. Not all together. Lots of stuff I could tell was Swofford Bros. Dry Goods Co. goods, because it was marked.

Q. Did you know the marks, brands, lot numbers and other indications of goods from Swofford Bros. Dry Goods Co.? A. Not all of them.

Q. Do you mean that you are not familiar with the wholesale stock so as to distinguish between wholesale houses shipments?

A. I was familiar with the wholesale stock, but not familiar enough to tell where each article came from, that is hosiery and small notions.

Q. Now, just to illustrate that, did you not know that all the hosiery from Swofford Bros. Dry Goods Co. is marked Radient?

101 A. No sir, part of it was Hindoo.

Q. Now, that was charged to the other was it not?

A. I don't remember particularly, but we had some of the Hindoo when we quit business.

Q. All of the hosiery was marked Hindoo or Radient, you know that, don't you? A. Yes sir.

Q. Who was the managing partner of E. M. Newton & Co.? A. E. M. Newton.

Q. What connection had E. M. Newton with the Lewisville Supply Co.?

A. They did not have any except that E. M. Newton was president of the concern, and had some stock in it.

Q. The Model Furnishing Co. was E. M. Newton & Co.'s.?

A. Yes sir.

Q. What became of the Model Furnishing Co.?

A. It was sold to C. M. Morgan.

Q. When, about?

A. About a year ago, possibly fourteen months.

Q. What retail business was it that you looked after, the Model Furnishing Co., the Lewisville Supply Co., or the retail branch of E. M. Newton & Co., which was it? Tell us where you were?

A. Prior to the opening of the Model Furnishing Co., I was on the road. The principal part of the time when I was in the house, I was in the retail department of E. M. Newton & Co. At that time E. M. Newton & Co. had a retail department in the same building in which the wholesale department was located. After the Model Furnishing Co. was started, I took charge of that, in another building. After it was sold, I went to the Lewisville Supply Co. The Lewisville Supply Co. was down stairs of E. M. Newton & Co.'s wholesale business upstairs. I would work part of the time down there and part of the time upstairs.

Q. When was the Model Furnishing Co.'s business
102 sold out, with relation to the contract of 1904, which you have testified about.

A. I don't remember exactly when it was sold, something like 14 or 15 months ago, no, it was about nine months ago.

Q. Up to the time it was sold, you had charge of the Model Furnishing Co.'s business?

A. Yes sir, it was only in existence about four months.

Q. Where did the Model Furnishing Co. get its stock of goods?

A. From E. M. Newton & Co.'s wholesale department.

Q. At that time was the Lewisville Supply Co. in existence? A. Yes sir.

Q. How long had it been in existence when the Model Furnishing Co. was sold out?

A. It had been in existence only ten months. The Lewisville Supply Co. was organized in February, 1904, and the Model Furnishing Co. was organized about one month later.

Q. How long did the Model Furnishing Co. run?

A. About five or six months.

Q. How long did the Lewisville Supply Co. run?

A. About one year.

Q. Where did the Lewisville Supply Co. get its stock of goods? A. They bought them from various people.

Q. Did they buy from E. M. Newton & Co.?

A. Yes sir, I think so.

Q. Now, you say that you were first on the road for E. M. Newton & Co., just explain what you mean by that?

A. I was traveling salesman.

Q. Selling goods for the wholesale department?

A. Yes sir.

Q. Then when the Model Furnishing Co. was organized you took charge of that and stayed with it until the time at which it was sold? A. Yes sir.

Q. Then you went to the Lewisville Supply Co., how long did you stay with them? A. With them yet.

103 Q. Did you come over here with E. M. Newton & Co., when they came to Texarkana? A. No sir.

Q. In answer to Mr. Arnold's question as to the statement contained in the Bankruptcy papers, explaining the Swofford Bros. Dry Goods Co.'s account, he called your attention to so much of the explanation as referred to the notes and accounts. Now, with regard to the paragraph just preceding that, as to the return of certain goods purchased under the contract, did you know of the return of these goods to Swofford Bros. Dry Goods Co.? A. Yes sir.

Q. And did you know that that was stated here in the petition, that these goods had been returned?

A. No sir, I did not see that, as I did not read any of th papers.

Q. You did not read any of the papers? A. No sir.

Q. Did you know that this statement was in these papers at the time you signed up these papers?

A. No sir, I did not read them.

Q. You say you did not read them? A. No sir.

Q. Did you know anything about the return of the goods, and of these notes and accounts at the time it was done?

A. Yes sir.

Q. Were you here at this time?

A. E. M. Newton telephoned me, and I came over to Texarkana on Monday and filed the petition, and he showed me what he had done up there. Mr. Ellis at that time had the accounts.

Q. You did not see the notes and accounts? A. No sir.

Q. You really do not know what notes and accounts were turned over to them, do you?

104 A. No, only what E. M. Newton told me, that he had turned over some notes and accounts from the books.

Q. Did he give you any names? A. No sir.

Q. Simply told you he had turned over so many notes and accounts? A. Yes sir.

T. B. Weathersby, first being duly sworn, testified as follows, on Direct Examination:

Q. Please state your name? A. T. B. Weathersby.

Q. What is your age, and place of residence?

A. I am 38 years of age, and live at Lewisville.

Q. How long were you connected with E. M. Newton & Co.? A. About a year and a half.

Q. From what time till what time?

A. Let me see, I was with them up until they failed, for about a year and a half previous to that.

Q. In what capacity did you act there?

A. Traveling salesman.

Q. Did you solicit purchasers and sell goods for the firm?

A. Yes sir.

Q. State whether or not you knew anything about the contract existing between E. M. Newton & Co. and Swofford Bros. Dry Goods Co.?

Counsel for the Intervenors enter an objection to this question, which objection was by the Referee overruled.

A. I did not.

Q. State whether the goods which had been bought by E. M. Newton & Co. from Swofford Bros. Dry Goods Co. were kept separate in any way, in reference to selling to customers, or whether the accounts were kept separate by E. M. Newton & Co.?

105 Counsel for the Intervenors enter an objection to this question, which objection was by the Referee overruled.

A. I don't know as to the accounts, but I think the goods were kept all together. The goods were all kept in one building and one store house.

Q. Goods that had been purchased from other firms, as well as from Swofford Bros. Dry Goods Co. were kept in one building? A. Yes sir.

Q. In making your sales, did you make any distinction as to where the goods came from, or from what firms E. M. Newton & Co. had bought them, or did you take the orders for what the customer wanted, and whether it was to be filled from goods bought from Swofford Bros. Dry Goods Co., or from those bought from other firms?

A. I took the orders in the regular way, and in one order book, and of course mailed them to the house.

F. C. Searcy, first being duly sworn, on Direct Examination testified as follows:

Q. Please state your name, age and place of residence.

A. F. C. Searcy. I live at Buckner, Arkansas, and am twenty years old.

Q. Were you ever employed by E. M. Newton & Co., and if so, in what capacity? A. As bookkeeper.

Q. From what time to what time?

A. From last September.

Q. September, 1904? A. Yes sir.

Q. Mr. Searcy, in keeping books of the firm of E. M. Newton & Co., please state whether a separate account was kept of these goods which were sold by E. M. Newton & Co. that had been purchased from the Swofford Bros. Dry Goods Co., from the goods which had been purchased from other firms?

106 Counsel for the Intervenors enter an objection to this question as being incompetent and irrelevant, which objection was by the Referee overruled.

A. No sir, they were not kept separate.

Q. Is there any way whereby the books would show what accounts solely, would represent the sale of goods, if any, that Newton & Co. bought from Swofford Bros. Dry Goods Co.? A. No sir.

Q. Then the accounts on the ledger would show the amounts that customers owed the firm of E. M. Newton & Co. on account of sales from the general stock? A. Yes sir.

Q. Did you know anything about this contract of July

20th, 1904, between Swofford Bros. Dry Goods Co. and E. M. Newton & Co.?

Counsel for the Intervenors enter an objection for the reason above given, which objection was by the Referee overruled.

A. No sir.

Q. When did you know of that contract for the first time?

Counsel for the Intervenors enter an objection to that question for the reason given above, which objection was by the Referee overruled.

A. Just now, today.

Q. Mr. Searcy, I wish you would turn to the account, in the ledger, of the Lewisville Supply Co., and state how much the balance due is. A. About $2400.00.

Q. State whether that account was created by reason of the sale of any goods by the wholesale department of E. M. Newton & Co. which had been bought by E. M. Newton & Co. after the 20th of July, 1904?

A. I could not say. I think some of it was, but not all of it. I don't know.

Q. State what constituted that account there. Sales from what stocks?

107 A. Sales from the wholesale stock, and some accounts for different things that were bought, or for money paid out for the Lewisville Supply Co.

Q. Do you know whether it was old goods or new goods that was sold to the Lewisville Supply Co.?

A. Mostly old goods, I think.

Q. Is there anything there to show whether these goods had been purchased from Swofford Bros. Dry Goods Co. or from other firms? A. No sir.

On Cross Examination, witness testified as follows:

Q. Did you have access to E. M. Newton & Co.'s private papers, or to the private papers of E. M. Newton?

A. No sir.

Q. Did you say that there was no way in which the accounts could be analyzed, so as to show what part of them represented the sale of Swofford Bros. goods?

A. There is no way but that some one who knows the goods, should take the invoices and pick out Swofford Bros. Dry Goods Co.'s stuff. That is the only way you can tell.

Q. In answering Mr. Arnold's question, you spoke for yourself, as not being able to tell which goods were which?

A. Yes sir.

Q. As a matter of fact, invoices of purchases made by purchasers were made and kept carefully in the house, were they not? A. Yes sir.

Q. Did you keep a day book, showing these sales, or merely the invoices? A. Copies.

Q. I will ask you, while you are here, if a customer came into the house to buy goods, was not a memorandum of his selections made on a blotter or a day book of some kind?

A. Made on a ticket and kept on file, and from
108 there to the journal.

Q. Does the journal show items? A. No sir.

Q. Your ticket then, would furnish the items on which the invoices would be made for the customers?

A. Yes sir, but we only charged the whole amount.

Q. These invoices show lot numbers, do they not?

A. Yes sir.

Q. With the stock number furnished on these invoices, a person familiar with the stock could readily ascertain whether or not they were Swofford Bros. Dry Goods Co.'s goods, could they not? A. I suppose so.

E. M. Newton, returns to testify, on Cross Examination, as follows:

Q. Have you a list of the items which you say did not belong to Swofford Bros. Dry Goods Co., included in the delivery of goods to them?

A. I have, and here attach it, amounting to $373.25. I have qualified it with a statement that it was impossible to identify all of the goods that were furnished us by other creditors, which were included in the lot of goods turned over to W. N. Moore for Swofford Bros. for the reason that many of them have no stock numbers on the invoice, such as neckwear, jewelry, and a good many other items which were turned over to them that were not shipped to us by them.

Q. Where did you get the items which make up the statement that you have hereto attached?

A. The items were taken from the invoice of goods turned over to Swofford Bros. Dry Goods Co.

Q. How do you know these items were not the goods bought from Swofford Bros.?

A. For the simple reason that I have invoices
109 showing that they were bought from other people, that is, the majority of them.

Q. I will ask you to attach the invoices which you refer

to. Will you do that? A. Yes sir.

Q. Now, as you say Mr. Krause, who was acting with you in the active taking of the inventory and of the selection of the goods of Swofford Bros. Dry Goods Co., was very positive about not taking any but the goods bought from Swofford Bros. Dry Goods Co., how do you explain that these goods got mixed with the Swofford Bros goods that you turned over?

A. I explain that from the fact that I was trying to favor Swofford Bros. Dry Goods Co. at that time, with Mr. Moore's consent.

Q. What do you mean by Mr. Moore's consent?

A. He did not object to any goods that belonged to any one else being put with his other goods.

Q. When you say he consented, what did he say?

A. I don't know what he said, he did not say much of anything, but as I explained yesterday, it was a case of a mutual understanding between us, as he did not object to receiving any of these goods and I was disposed to turn them over to him. That is about all there is to it.

Q. Did you not understand at the time, that you might be called upon to make oath to the effect that the goods turned over to Swofford Bros. Dry Goods Co. were goods bought from them?

A. I did not think it would be necessary, no sir.

Q. You spoke of a mutual understanding, tell us what Mr. Moore said that would indicate that he was willing for you to put in a lot of goods that had not been bought from Swofford Bros.?

A. I am unable to tell what Mr. Moore said in regard to the matter.

Q. Can you state anything that he said of that kind?

A. I would not undertake to state anything exactly as he said it. I have stated once the sense of it, and that is the way he made me understand it.

110 Q. Was Mr. Moore's attention called to these different items which you have listed as being goods other than those of Swofford Bros.?

A. Not any more than it was to any of the items that were taken out.

Q. How, then, could Mr. Moore know that you were putting in goods that did not belong to Swofford Bros. Dry Goods Co.?

Q. Well, there was something about this kind of a tran-

saction that a man usually knows, but I don't know as I can explain. They had undertaken to identify their goods, but could not quite identify all of them.

Q. Were these goods called to Mr. Moore's attention, that you know did not belong to Swofford Bros.?

A. They were not.

On Re-Direct Examination, witness testified:

Q. I will ask you to turn to your ledger, showing your account against the Lewisville Supply Co., and will ask you to state to the Court, whether any goods are charged which were bought from Swofford Bros. Dry Goods Co. by E. M. Newton & Co. after July 20th, 1904?

Counsel for the Intervenors enter an objection to that question on the ground that it is immaterial, which objection was by the Referee overruled.

A. Yes sir, there are a few.

Q. You say a few. How much is that account?

A. About $2400.00 or $2500.00.

Q. What proportion of this account represents the price of goods which were bought by E. M. Newton & Co. from Swofford Bros. after July 20th, 1904?

A. As a matter of fact, the account the first of January was about $5000.00. At that time there was about half of the account which represented goods bought from Swofford Bros. Since that time, I don't suppose there has been exceeding over $250.00 sold by us to the Lewisville Supply Co. which was bought from Swofford Bros.

111 Q. Were any of the goods that you had bought from Swofford Bros. Dry Goods Co. prior to July 20th, 1904, sold to the Lewisville Supply Company? A. Yes sir.

Q. Was this account of the Lewisville Supply Co. transferred to Swofford Bros. Dry Goods Co., with the same accounts? A. It was.

T. A. Bryant, Trustee, testified as follows:

Q. You were elected Trustee of E. M. Newton & Co. at the first meeting of the creditors, on July 13th, were you not?

A. Yes sir.

Q. You had also been receiver prior to the first meeting of creditors? A. Yes sir.

Q. State whether you took stock of the goods which had been turned over by E. M. Newton & Co. to Swofford Bros. Dry Goods Co., and how much it invoiced?

A. Yes sir, I had it invoiced, and it amounted to $6237.21.

Q. What price did these goods sell for?

A. These goods sold at $3135.00.

Q. Did you invoice the millinery E. M. Newton & Co. had, in a separate item, and if so, how much did that amount to?

A. Yes sir. The millinery invoiced $5326.72.

Q. Did you invoice the remaining dry goods aside from what had been claimed by Swofford Bros. Dry Goods Co., and if so, how much did these amount to? A. Yes sir, $3276.00.

Q. How much did the fixtures invoice?

A. About $1072.

Q. How much did the balance of the stock sell for, including fixtures?

112 A. $2965.00.

Q. How much have you collected on the Swofford Bros. Dry Goods Co.'s notes and accounts?

A. About $2250.00.

Q. How much have you collected on the other notes and accounts? A. About $225.00.

Q. How much do these other notes and accounts amount to, meaning those not claimed by Swofford Bros. Dry Goods Co.? A. About $7400.00.

Q. These constitute all of the assets of E. M. Newton & Co., so far as you know? A. Yes sir.

On Cross Examination, witness testified:

Q. Have you got the total there of rwhat the sale brought? A. $6100.00.

R. L. Searcy, first being duly sworn, testified as follows:

Q. Mr. Searcy, what is your business and place of residence?

A. Practicing law, and I live at Lewisville, Arkansas.

Q. How long have you known the members of the firm of E. M. Newton & Co.? A. Twelve or fourteen years.

Q. State whether they have been constantly engaged in business in your town during that time.

A. Not all the time under the firm style of E. M. Newton & Co. They have been engaged under the style of E. M. Newton & Co. for the past eight years.

Q. Do you know of any debts that exist against E, M. Newton & Co. at Lewisville, if so, give the names and amounts.

Counsel for the Intervenors enter an objection, which objection is by the Referee overruled.

113 A. I know they are indebted to the Merchants &

Farmers Bank at Lewisville, on notes to the extent of $5000.00, which were signed by personal endorsers, by people living at Lewisville. Also, to E. W. Dobson, hardware and merchandise, for about $550.00. These are the largest of their creditors there.

Q. Were you the endorser of any of the paper of E. M. Newton & Co.?

A. I am the endorser on one note for $2500.00.

Q. To this Merchants and Farmers Bank?

A. Yes. That note has since been paid.

Q. By whom?

A. By myself and the other two endorsers.

Q. When you heard of this trouble of E. M. Newton & Co., did you come to Texarkana to investigate it?

A. Yes sir. I came over Saturday night, I forget what day of the month, and saw Mr. Newton and ascertained from him what had been done; if he had turned over to Swofford Bros. Dry Goods Co. a large portion of the dry goods stock, and notes and accounts to the amount of $10,000.

Q. Besides the merchandise? A. Yes sir.

Q. What steps did you then take in persuance of your interest and the interest of the other creditors, when you arrived at Texarkana?

Counsel for the Intervenors enter an objection to this question on the ground that it is immaterial and incompetent mattter. This objection was by the Referee overruled, and the witness answers the question.

A. As soon as I came over here, I ascertained the condition of things, and found that the goods had not been removed from the building, and I represented to Mr. Newton the necessity of him going into Bankruptcy, so that we might hold these goods and other property turned over. I returned home Sunday morning, and came back Monday morning, which was the 3rd day of July. Mr. Ellis, in the meantime,
had come from Kansas City, he and Mr. Hanna, and
114 I talked with Mr. Ellis and with Mr. George Webber,
and found that they were perfectly willing, and wanted E. M. Newton & Co. to go into Bankruptcy, and we talked about filing an involuntary petition against them in the office of Webber and Webber, and I suggested that E. M. Newton & Co. go into voluntary bankruptcy. The question then came up of costs, and I found out from Mr. Newton that he was willing to go into voluntary bankruptcy, and I

told him that I would prepare and file his petition. Mr. George Webber and myself preparet the petition in his office. We had a stenographer also working on the exhibits, and we prepared the main papers of the petition, the schedules, etc. Mr. Ellis was present part of the time, but he was not participating actively in the preparation of the papers. Will state here that we were in a considerable rush because it was in the afternoon, and growing late, and it was necessary for us to hasten the matter, in order that we might get the petition filed that day. Mr. George Webber and myself prepared the petition until we got to the Schedule, I believe to Schedule A, which is the liabilities, and had listed most of this. The question then arose as to the Swofford Bros. Dry Goods Co. account. George Webber and myself had decided to leave it out, as it was not proper to insert it at all. Mr. Ellis was then present and he insisted that it be inserted in the petition, and this co-called conditional contract; that the Swofford Bros. account be listed in full without making and deduction for the goods, notes and accounts turned over to them under this contract, and he dictated that part of the Schedule A., immediately following the Swofford Bros. Dry Goods Co.'s account, which is listed as $13310.56. I will say that I paid particular attention to the dictation as made by Mr. Ellis, with a view of noting whether or not he proposed to represent that these notes and accounts which were turned over, represented exclusively goods bought of Swofford Bros. Dry Goods Co. I did not notice that he was representing it,
and I did not know anything about it until sometime
115 later, when Major Sevier called my attention to it
when I inquired as to when that agreement had been made, making certain admissions as to these notes and accounts, (it was the agreement of July 4th, 1905). I will state that it was understood that I was to file this Petition in Bankruptcy, and Mr. George Webber was simply assisting me in the preparation of it, as a matter of accommodation, and we were anxious to get him into Bankruptcy that evening.

Q. Did you know anything had been stated in that petition in Bankruptcy, or in any of its exhibits, to the effect that it would be represented that the notes and accounts were for goods that came from Swofford Bros. Dry Goods Co., and that the notes and accounts represented the purchase price of goods which had come from Swofford Bros. Dry Goods Co.?

Counsel for the Intervenors enter an objection, as the petition will speak for itself, which objection was by the Referee overruled, and the witness answers the question.

A. No, I did not know that that representation was contained in the petition.

Q. When did you, for the first time, know that it had been written there?

A. When I inquired of the Referee a little while back, why the Receiver, with the approval of the Referee, had signed that agreement making this admission, that agreement of July 4th, 1905.

Q. Would you have made an agreement of that kind, or permitted such a statement to go into the Petition in Bankruptcy, as appears there in regard to these notes and accounts?

Counsel for the Intervenors here enter an objection to this question, which objection was by the Referee overruled, and the witness will answer the question.

A. No sir, I would not. I had that matter especially in view, and thought I was guarding against it. After Mr. Ellis dictated, I did not read the petition and never knew it contained that statement until the Referee showed it to me a few days back.

116 Q. Who was operating the typewriter?

A. There were two typewriters in operation. Mr. George Webber wrote this part referred to.

Q. He wrote that part that represents that the notes and accounts were for merchandise which came from Swofford Bros. Dry Goods Co.? A. Yes sir, he wrote that part of it.

Q. Did you agree, in any manner whatever, to such statement going into that Petition in Bankruptcy, or in any of the exhibits?

A. No sir. If I had known, would not have permitted parties to sign it. We were in great haste to get it filed, and none of us read the petition after it was prepared, nor the schedule. It was issued in triplicate, I believe.

Q. Who put the petition together?

A. Me and Mr. George Webber put them together, and as we would come to each of these exhibits to be signed by the parties we would have E. M. Newton and John F. Newton sign them and Mr. George Webber swore them.

Q. After that petition was prepared, state whether E. M. Newton and J. F. Newton signed them?

A. Certainly they did. I just stated that.

Q. Did they read it, or have opportunity to read it?

A. They did not read it, I am sure, as Mr. Webber asked them if they wanted to read it, and I do not recollect as to that. He asked them if they swore to the facts put there, and they said yes. They could have read it, if they had wanted to, I suppose. If they had asked to read it, no one would have objected. We were in great haste to get the papers up here.

Q. Who carried the petition to the Referee's office and filed it?

A. I don't know who took the petition. All three of us came together, and the paper was filed, but I don't know who had it, but Mr. Webber said I did. Both Mr. Newtons came with us, and Mr. Ellis, Mr. Webber and myself.

117 Q. When did you then go home?

A. I went home that evening.

Q. Were you here on the 4th of July when that agreement was made by the Receiver and Swofford Bros. Dry Goods Co.? A. No sir, I was not in Texarkana.

Q. Did you know such an agreement was contemplated or would be made? A. No sir.

Q. Did you ever consent to such an agreement?

A. No sir.

Q. When did you find out that the agreement had been made?

A. I don't remember when that was. When I came back to Texarkana. I don't remember the time.

Q. Were you present at the creditor's meeting on July 13th, 1905?

A. Yes. I may have ascertained it then, I don't know. I will state that I had no further connection with the petition of E. M. Newton & Co. after the filing, and no one else that I know of.

Q. As a matter of fact, you were using them in that way, to get them into bankruptcy, and would have nothing further to do with it after getting them into bankruptcy?

A. Yes. That was the object of Mr. E. M. Newton and myself that day.

Q. You do not now represent them, and have not represented them?

A. No sir, only in that way. I wanted to be sure to fasten these goods here, and get them into bankruptcy before these goods could be gotten away from Texarkana.

On Cross Examination, witness testified:

Q. You stated that Mr. George Webber was simply acting as a matter of accommodation to you, in using the typewriter?

A. Yes it was. I had talked with Mr. Webber and it was understood that I would prepare this petition, that E. M. Newton & Co. might go into bankruptcy that after-
118 noon, and Mr. Webber told me to come on down to the office and he would help me get it up.

Q. Mr. George Webber was not participating with you in the representation of the bankrupts then, in the filing of the petition? A. I did not understand it so.

Q. He was merely accommodating you, in using his office and typewriter?

A. That is the way I understood it. Of course I could have gone some where else to prepare the petition.

Q. Now, you say that Mr. Ellis dictated the explanation which is attached to the Swofford Bros. Dry Goods Co.'s claim? A. Yes sir, he did.

Q. You heard the dictation, did you?

A. Yes, I heard it, and paid special attention to it.

Q. Now, it was dictated to Mr. Webber, who was using the twpewriter, was it? A. Yes sir.

Q. Did Mr. Webber put down anything which Mr. Ellis did not dictate?

A. Not that I know of. I do not suppose that he did. If he did, I did not know of it.

Q. Did you object to Mr. Ellis dictating it?

A. No sir, because he insisted upon dictating it, and I intended that if he made the representation that appears in there now, that I did not propose to stand by it, or permit it to go in.

Q. Why didn't you hear it, if you were there?

A. I don't know why. I thought I was staying right by him, and he talked rather out of the ordinary tone, talked loud, and I thought that I heard everything he said, and for that reason, I did not think it necessary to read it over.

Q. Now, Mr. Searcy, do you recall that you and Mr. George Webber had concluded to leave the Swofford
119 Bros. Dry Goods Co.'s matter out entirely, and that the matter was written out by Mr. Ellis insisting on making a full and open statement of just what had occurred in connection with the Swofford Bros Dry Goods Co.'s claim?

A. I have already stated that Mr. George Webber and

myself decided that it should not be placed in the petition, and that Mr. Ellis insisted that it should be in there, and at his dictation, it was placed there.

Q. In insisting on this going in, did he not give as a reason for it, that he thought it better that all of the facts should be presented in the petition?

A. He said that that would make the record complete. That was his argument for insisting on its going in.

Q. Now then, with that statement, you consented that he should dictate it?

A. We made no objection to his dictation, either myself or Mr. Webber.

Q. Now, after Mr. Ellis got through dictating, do you not remember that Mr. George Webber read it over, and that there was a blank for an amount of dollars, which you and Mr. Webber sent out Mr. Newton to get data to fill?

A. I don't remember Mr. Webber's reading it over at all. I know that the amount was left open and my recollection is that they sent for Mr. Newton, and he and Mr. Hanna and possibly Mr. Ellis went to Newton's books, which were in his building, to get the amount.

Q. Do you not remember that this statement was read over when you and Mr. Newton were both present in the office?

A. No sir, for as I have just stated I have no recollection of having it read or of reading it. When we would finish each sheet, we threw it aside, and when the petition was completed, we would put them together in triplicate form.

Q. Now, when you put the petition together, this statement running over from one page to another attracted your attention, did it not, in getting the papers consecutively?

120 A. No sir, because we finished each page and would just put it on another and when the petition was finished, we took the three duplicates, and all together, and all that was necessary was to turn to the places where the two Newtons should sign, as indicated by the lines, and have them sign.

Q. Now, at that time, when E. M. Newton signed it, did not Mr. Geo. Webber ask him if he wanted to read it over, and did not Mr. Newton then say that he had heard it?

A. As I stated before, I do not know whether he did or did not, I have no recollection of it, and I do not know whether he did or did not. I remember that he asked him if he swore to the facts in the petition, and that he said yes.

Trustee Rests.

W. N. Moore, being recalled, on Direct Examination, testified as follows:

Q. State about how often, as near as you can, you received your written or verbal statements from E. M. Newton & Co., as to his financial condition, up to within a year of the contract of July 20th, 1904, and up to the time of his failure.

A. He usually came to Kansas City twice a year, once for the purpose of buying spring goods, which would bring him there the early part of the year, and then late in the summer he would come to make his purchases of fall goods. It was my practice to take a written statement from him on his first visit, which he would make upon the statement that it was the result of an inventory which he had taken at the beginning of the year. Then, when he came in the summer, I would always talk over with him, in a general way, his business, and he would tell me the amount of his indebtedness, and to whom he was indebted, and so on. That was usually verbal, and I would simply make memoranda of these statements.

121 Q. Did he always represent the condition of his business to be, so far as financial responsibility was concerned, solvent?

A. He always showed himself to be solvent, showing his net worth to be about $10,000.00 or $12,000.00, as I remember it now.

Q. When you came here the latter part of June, and began to negotiate with him, which resulted in your taking back certain goods and certain notes and accounts, state if you called upon him then for a statement of his business?

A. I did.

Q. State if you demanded of him to see his books and why?

A. My visit here was prompted by the receipt of a letter from him in which he went into detail about the very unfavorable business conditions by which he was then surrounded, owing to the excessive rains, the crop outlook was very unpromising, and he had a large amount of indebtedness, which he was unable to pay, and I came down for the purpose of ascertaining what his condition was and with a view of aiding him, if his condition warranted it. I asked him in that connection, for the privilege of looking at his books, so that I

might determine then, just what his condition was and how I could best aid him.

Q. State if he presented a trial balance which purported to be the showing of his business?

A. He produced what he stated was a trial balance from his books, taken on the 1st of that month. June 1st.

Q. What showing did that make?

A. It showed him to be solvent.

Q. What became of that trial balance?

A. I don't know.

Q. State if you took it away, or left it with him?

A. I had no use for it when I left here.

Q. Now, was it before or after you saw the trial balance that you called for his books?

A. I had suggested seeing the books in the first instance, and he met my suggestion by showing me the trial balance, which he stated was a transcript of his books. I dis-
122 covered in the meantime, that he had told me he had about $18,000.00 to $20,000.00 worth of merchandise on hand. I had looked over his stock, and arrived at the conclusion that his statement was approximately correct. His trial balance, however, showed his merchandise account, if I correctly remember, to be about $10,000.00 more merchandise than he had on hand. I pointed out the discrepancy to him, and asked them to see his ledger and merchandise account, with a view of seeing if I could not reconcile the difference. It was then, for the first time, that he positively refused to let me see his books.

Q. Did he state that he desired to await the arrival of Mr. Krause or make any such intention as that as his reason?

A. Yes. After I had urged upon him the folly of his position, and shown him that I had perhaps a larger interest in his business than any one else, except even himself, he then urged that he did not understand his books himself, and that he would not be able to explain any discrepancy which I might find, that his bookkeeper was over in Lewisville, and I suggested that he telephone and have his bookkeeper come over here on the evening train, and that we would go over the books together that night. He went out, or I don't know but that he went to the telephone right there, and telephoned, or started to telephone to his bookkeeper to come here. Later in the evening he made the excuse that he preferred to wait until Mr. Krause came here, that he would be

here that evening, and that he preferred to talk with Mr. Krause before I was allowed to see the books.

Q. Now, then, the next day, state whether or not he admitted to you that he had been making false statements to you for several years about his business?

A. He did, with tears in his eyes. Told me that he had lied to me for two or three or four years, and that his statements to me as to his condition were uniformly false.

123 Q. Was anybody present besides you and himself when he made that statement?

A. Mr. Leo Krause was present.

Q. Now, what effect had that upon you, as to the matter of the business relations then existing between Swofford Bros. Dry Goods Co., and E. M. Newton & Co.?

A. I determined immediately to sever relations with him as far as I could.

Q. State whether or not that conclusion was arrived at without regard to his solvency or insolvency? A. It was.

Q. State whether or not he made any contentions or objections as to your right to cancel the existing contract of July 20th, 1904?

A. You mean to exercise my rights under it? A. No sir.

Q. Now, in taking the goods, Mr. Moore, Mr. Newton has stated that while he cannot repeat any particular language used by you, that there a mutual understanding between you that he should favor Swofford Bros. Dry Goods Co., by giving you goods that did not belong to them. State whether that is true.

A. It is not. If you like will tell you all that passed on that subject. When we began to take the goods, and to determine how to take the goods, we went over the stock, and he told me that substantially all of the goods in the west side of the house which he occupied were our goods, except some men's clothing. I then determined that the best way to proceed would be to allow our goods to remain in that room, and to take out all the goods that did not belong to us. When we started in, Leo Krause being present, Mr. Newton would place a lot of goods on a table, leaving me to suppose that they were our goods. I myself, not being familiar with all of our goods, did not recognize the error, but Leo Krause came up and said, these goods did not come from us, and Newton said, "Oh, you just as well keep them, you may as well leave them here, they are the same class of goods." I told

124 him then and there in the strongest language I knew how to use, that I did not want to take a single, solitary item that could not be identified by himself as having come from us, under that contract. Frequently during the day, Mr. Krause would find goods and say, "Mr. Moore, these goods did not come from us," and everything I ordered taken out. I not only would have in mind myself the importance of not taking any goods that did not belong to us, but I was cautioned by Mr. Webber, under whose advice I was acting, that it was very important that I not allow any goods to be turned over which could not be clearly shown to have come from Swofford Bros. Dry Goods Co. under that contract. The best evidence of our good faith is that in taking an inventory of the goods, Mr. Newton himself called out the goods, and Mr. Krause wrote it down, the inventory being in Mr Krause's hand writing, and we put down lot numbers, and every other means of identification, which we would not have done had we not been convinced that they were our lot numbers, and that the goods came from us.

Q. Mr. Newton further stated that where goods were questioned, as to where they came from, they were put among Swofford Bros, Dry Goods Co.'s goods, with your knowledge and consent. State if, in any single instance that that was true.

A. Not in a single instance. On the contrary, Mr. Newton was the only one engaged in the work at hand who showed any disposition to put in other goods, and we had to hold him in check and keep him from putting in goods that we did not want.

Q. If there was any question about the goods, what did you do? A. I had them taken out.

Q. Mr. Newton has attached here a statement of the divers items amounting to three or four hundred dollars which he says he has invoices to show that they are goods of other houses; state if you are yourself, individually, prepared to check over these lot numbers, and others in this year, which appear upon the inventory, or would Mr.
125 Krause be better prepared to pass upon these marks?

A. I would not be competent to do it, but on the other hand, Mr. Krause is thoroughly familiar with the goods which we handle, of our lot numbers and other means of identification which are not familiar to me.

Q. Mr. Newton mentioned a lot of knee pants as having

been especially called to your attention. Why did you take them when you knew they were not goods of Swofford Bros.?

A. Mr. Krause called the item to Mr. Newton's attention, and asked him, and expressed doubt of their having come from us, and Mr. Newton most vehemently insisted that they were from us; and that it was a job lot of goods that he had bought from our Mr. Powell, the head of the department to our business that handles that particular class of goods, and that he was prepared to make oath to the fact.

Q. I will ask you if at any time during the taking of the inventory of the lot of goods which you received from Newton & Co. it was mentioned that no goods were wanted in that lot except what could be identified under oath, if necessary?

A. It was frequently referred to, for I knew from my experience that the chances were ninety-nine out of a hundred that the identity of these goods must be subject to a judicial investigation. I knew that litigation would result and I had that in mind all of the time to fortify my position as strongly as possible by taking only such goods as we could clearly identify as having come from us, under that contract.

Q. Mr. Newton admits that he was anxious to favor Swofford Bros. as he calls it, by putting in to the goods delivered to you, goods which had not been bought from you. State what his motive was in this, if you know, by anything that he said or did.

A. He was begging favors of me, even to the extent of asking me for money, and of asking me to re-deliver to him some of the notes which he had assigned to me, that he might go discount them and realize money on them.

Q. Did you do so? A. No sir.

126 Q. State whether or not Mr. Newton took you aside and made any propositions about your giving him $500.00, and from that down to $100.00, for his good will and friendship? A. He did.

Q. State whether or not this was in relation to any litigation which might ensue?

A. Yes. He intimated that he had already favored us, and that he would be expected to continued to favor us and that he felt I ought to re-imburse him for it.

Q. That was his first proposition to you, what ultimately came of it in a month?

A. He first put his figures at $500.00, and gradually dropped until he finally saw I would not give him anything. Of course I was not seeking to antagonize him. I did not want to do that, and I simply held him off and answered him in such a way as to try not to offend him.

Q. Was this before or after the goods were delivered?

A. After.

Q. State whether or not you yielded to any of Mr. Newton's importunities in this regard.

A. I did not.

Q. Mr. Newton has recited in your hearing several alleged agreements which he claims that you made him as an inducement to him to turn over the goods, notes and accounts in controversy. State whether any part of his statement in regard thereto is true, and if so, what part of it?

A. There is none of it true, except that he, all along, was trying to get me to promise him something, and suggested himself what I might do for him, but I was careful to avoid making him any promise and I cautioned Mr. Krause not to make him any promise and when I went to Kansas City, and sent Mr. Ellis here, I went over all that with him, and cautioned him what he would meet with in that direction
127 and for him to make no promises.

Q. State whether or not he has ever claimed to you that you had ever made him any promise?

A. He has not.

Q. State whether or not he has made application to you since his bankruptcy for credit, and if so, has he ever based such application upon alleged promises on your part.

A. The first application came through our Mr. Hanna, who was down here, either Mr. Krause or Mr. Hanna signed the telegram, I don't know which. I received a telegram while Mr. Hanna was here, which was signed by one or the other, asking me that I give Newton's new concern a line of credit. I have forgotten what the amount was, somewhere in the neighborhood of $1000.00 or $1500.00, and my recollection is that I wired that under proper conditions I could. That is the kind of business we are engaged in. The second application was by letter from Mr. Newton, which wanted to know if we would furnish him with a line of samples of our goods, from which he might sell. I do not remember definitely what his proposition was, but I know that that was a part of it. At any rate, I declined it as politely as I could.

Q. What I asked you in the question was whether he made any applications to you based upon any alleged promises or agreements, which he now claims?

A. He has not. Not that I know of. I don't know what he based his request to Haana on. He has never based any application to me on any such terms.

Q. Mr. Newton states that in the selection of the notes and accounts that he, with your knowledge and consent, selected the notes and accounts of the better class, and without regard to whether they were the result of sales of goods of the Swofford Bros. Dry Goods Co. or not?

128 A. I had demanded of him that he comply with the conditions of the contract, which provided that he should turn over to me his notes and accounts which were the proceeds of the sale of the goods which he had received from us under that contract, and in pursuance of that demand, he got out certain notes and his ledger, and we went to the office of Webber & Webber. I sat at a desk, and he sat near by and called out to me the accounts from his ledger, giving the name of the debtor, the address, and the amount of the debt, and date of maturity, as I remember, and I made a list of them, and so far as the notes are concerned, he simply endorsed them in blank, and gave them to me. I afterwards had a typewritten copy of the accounts made and took a written assignment of them, which has been introduced in evidence.

Q. State whether or not Mr. Newton understood the contents of that written assignment, and understood it to a representation that the notes and accounts turned over were the proceeds of the sale of the Swofford Bros. Dry Goods Co.'s goods. State now, if he understood that assignment to be a statement that the accounts turned over to you were in fact the proceeds of the sale of Swofford Bros. goods?

A. He gave me every reason to believe that he did so understand it; he read it over before he signed it, and he turned over the accounts to me on demand for that purpose.

Q. State what knowledge, if any, you had of these accounts other than as stated to you by Newton, in response to your demand for the notes and accounts referred to under your contract of July 20th, 1904?

A. I had none at all.

Q. I want to ask you, for fear that I have overlooked it, whether or not the selection of these goods, you confined

yourselves to selection of goods bought under the contract of July 20th, 1904?

A. Yes sir, I tried to.

Q. State whether or not there was included in that lot of goods delivered to you any goods bought from Swof-
129 ford Bros. Dry Goods Co. prior to the contract of July 20th, 1904?

A. I could not answer that question, except to say that Mr. Newton and Mr. Krause assured me that they had been bought since that time.

Q. There were none, to your knowledge?

A. None to my knowledge, no sir.

Q. Mr. Newton referred to some ribbons of Rosenthal-Sloan Millinery Co. being called to your attention, and being taken by you notwithstanding that they belonged to the Rosenthal-Sloan Millinery Co. State if that is true?

A. It is not.

Q. State whether or not you ever stated to Mr. Newton, as an inducement to him to deliver these goods and notes and accounts to you, or for any purpose, that by so delivering that much of the stock and of the notes and accounts, it would put him in better shape for you to get 25 per cent compromise proposition?

A. I have no recollection of anything of that kind.

Q. Did any such arrangement or conversation occur?

A. I distinctly avoided all the way through, entering into an agreement with Mr. Newton.

Q. State whether or not he insisted upon calling in other interested parties, with a view of their participating in the arrangement that he was making?

A. I think he suggested that in view of the large amount he owed the Rosenthal-Sloan Millinery Co., that he should say something to them about it.

Q. Was that before or after the delivery of the goods to you? A. I think it was after.

Q. Was anything said about bankruptcy proceedings until after you had enforced your contract by the delivery of the notes and accounts and goods?

A. Well, I do not remember. He may have said something about it, but I do not recall that he did.

Q. He stated that nothing was said about that until the Monday after he delivered the goods, and notes and
130 accounts to you the previous week, Friday, I believe. State whether or not you made any effort to delay the bankruptcy proceedings on his part?

A. No, I had nothing to do with his bankruptcy proceedings at all.

Q. He stated that his old indebtedness to you was not fully paid and that he could not say that any part of it was embraced in your present statement. Please state to the Court, whether or not any part of that indebtedness, existing prior to July 20th, 1904, is included in the statement of your account against him? A. There is not.

On Cross Examination, witness testified:

Q. On what day did you reach Texarkana, day of the month?

A. I think it was the morning of the 29th of June.

Q. Did Mr. Krause come in that night?

A. Yes sir.

Q. What time that night did he come in?

A. I think it was something like 8:30 or 9 o'clock.

Q. Did you have any conversation with him that night?

A. Yes sir.

Q. Did you also converse with Mr. Newton that night?

A. Yes.

Q. Where did you three meet?

A. Mr. Newton was at the Hotel before Mr. Krause came, and left me to go to the depot to meet Krause. I then went to my room, undressed, and went to bed, and later they came in to my room.

Q. How long did you remain in conference?

A. I did not remain more than half to three quarters of an hour, perhaps.

Q. Was it at that time that Mr. Newton told you the statements he had made were false?

A. No sir.

131 Q. When you parted company that night, state whether it was with any distinct understanding as to what was to be done the next day?

A. Yes. Newton had agreed that I might look at his books, the next day, and he was trying to induce Leo Krause to go into partnership with him, and Leo Krause was to withhold his decision until after I had looked at the books.

Q. When did you find out his actual condition?

A. Well, I never have known his actual condition. Don't know it today.

Q. What did you look at the books for?

A. I did not look at them.

Q. When you found they would let you look at the books you then did not want to look at them, is that true?

A. When I went around to his place of business the next morning, he then confessed to me that he had been lying to me, and then I did not care anything about the books.

Q. Did you ask him how much his liabilities were?

A. I had done so, and the statement he gave me of the trial balance the day before had purported to show what it was, but I do not remember now what it was.

Q. Did you try to find out his true condition after he made the confession to you?

A. No sir.

Q. When he told you he had been lying to you, did you understand that to mean that he had been misrepresenting his liabilities and his assest? A. Yes sir.

Q. Then you must have had some reason to believe that the man was insolvent?

A. I did not care then whether the man was insolvent or not, as it would not have affected my action one way or the other. He would have had to pay me our account or live up to the conditions of that contract.

Q. I will ask the same question I asked you before, did you have any knowledge or information that the man
132 was insolvent at the time you took these goods and these notes and accounts?

No sir.

Q. Did not his confession lead you to believe that he was in a very critical financial condition?

A. I knew he was in a critical financial condition before I came down here from Kansas City, by reason of the amount of his indebtedness that was due and the poor collections he was making.

Q. Did not the fact that he refused to show you his books lead you to believe that he was either insolvent or in a failing condition?

A. No, not necessarily.

Q. Do you mean to tell the Court that you believed the man was solvent at the time you took these goods over?

A. No sir.

Q. You have already stated that he gave you a showing as to what his liabilities were?

A. Yes.

Q. What were these liabilities?

A. I have forgotten.

Q. Cannot you approximate the amount?

A. No sir, not with any degree of definiteness.

Q. What is your recollection of the amount of his liabilities?

A. I would not like to state as it would be mere fiction.

Q. Did he not tell you and Leo Krause, that his liabilities were about $30,000.00?

A. I don't know what he stated to Leo Krause, but I have no recollection of his having stated that to me. What I was primarily seeking for and trying to ascertain and was most interested in, was not so much what his liabilities were, as to what his net worth was, and what assets he had in excess of his liabilities. I could have taken care of his liabilities, that is, if his condition and behavior had warranted it, even if it had been $30,000.00.

Q. How could you get to his net worth without knowing his liabilities?

133 A. I never did get at his net worth. I got what he had told me then he told me he had lied. Beyond that I did not care.

Q. Now, you mean to say to the Court that when he told you he had lied about his true condition, you had no reason to believe that he was insolvent?

A. Not any more than that statement would carry, that he had lied to me as to what his condition was.

Q. Did you tell Mr. Newton at that time, either before or after these goods were turned over, that if he would transfer these goods and notes and accounts, that then you would take up the question of a compromise with his other creditors?

A. No sir. I made it a point to avoid making him any promises.

Q. Was there anything said about a compromise with his other creditors, and the beginning business again with the same stock of goods?

A. After we had gotten through with this delivery, and before I left town, he talked about almost everything, and tried to get me to promise him all sorts of things. I was glad to get out of town to get rid of him, as he had hounding the life out of me.

Q. You have not answered my question?

A. I don't know whether he had or not.

Q. Did you advise him to go into bankruptcy before you left? A. I do not think I did.

Q. Did you ever advise him to go into bankruptcy?

A. I do not recall that I did.

Q. Did you tell him that if he would turn over this stock of goods and the notes and accounts, that everything else failing, to put him back into business, that you would then buy in the stock at the bankrupt sale, and put him back in business again? A. Most certainly not.

Q. I understand you, then, to say that you made no promises or agreement whatever, as a consideration for his voluntarily turning over the goods and accounts?

134 A. That's right.

Q. When he told you he wanted to notify some of his other creditors of this transaction, of the turning over of these goods and accounts, particularly the Rosenthal-Sloan Millinery Co., why did you object to the other creditors knowing of the transaction? A. I did not object.

Q. Did he say he wanted to notify them?

A. Said he was going to do so.

Q. What did you say?

A. I don't know that I said anything.

Q. Did you object to his notifying them? A. No sir.

Q. I understand you to say that when he came to turn over the book accounts, that you took the ledger to Webber & Webber's office. Is that a fact?

A. Yes sir. I did not take it, he took it.

Q. It was there that the book accounts were selected?

A. Yes sir.

Q. Did you see them? Did you try to get him or finally induce him to turn over to you the best book accounts and notes?

A. I did not know which were his best book accounts. I had no means of knowing.

Q .Did you ask him to turn over the newest and best accounts? A. No sir.

Q. Did he turn over the best accounts and notes?

A. I don't know whether he did or not.

Q. Have you an opinion on that subject at this time or not, as to whether you got the best or not?

A. I have an opinion as the result of testimony I heard here today on the part of the Trustee, who stated the amounts collected on the notes and accounts which had been assigned to us, and the amount that had been collected on the others. I saw that a very much larger part had been collected

135 on ours, and of course arrived at the conclusion that they were the best.

Q. The Trustee testified that on your paper of some $9,000.00 of $10,000.00, he had collected $2200.00, and on the bal-

ance of the paper which had not been turned over to you of $740.00 he had collected $225.00. Is it your opinion, from this result, that you did, in fact, get the best notes and accounts?

A. The testimony of the Trustee would lead me to think so.

Q. Then, Mr. Newton must have secretly given over the best accounts to you, without your having known anything about it, or having asked about it?

Q. He may have been governed by the same motive as governed him in trying to give us goods which did not belong to us. He was willing to do anything for us then.

Q. Was not that action, in fact, on account of promises that you had made or inferences that you had left with him that you would put him back in business again with the same stock?

A. It could not have been on account of any promises that I had made him. He had no reason for drawing any inferences that I know of.

Q. What, in your opinion, was the motive that actuated him in turning over to you property that you could not claim under the terms of your contract?

A. I think he was trying to curry favors with me, with an eye to the future, is the only conclusion that I can reach.

Q. How could he be trying to curry favors with you, with reference to turning over the best notes and accounts, wi. you did not know you were getting these favors?

A. I don't know.

Q. Mr. Moore, did Mr. Newton tell you at the time these notes were turned over that they were for goods he had sold which he had bought from Swofford? A. Yes.

136 Q. In what way did he tell you, and give the language?

A. He told me by giving them to me in response to my demand for them as such, and by signing the assignment of them, which stated them to be such.

Q. Then it was not in words that he told you?

A. I don't remember that he told me in words.

Q. Did you not state a moment ago, that you did not investigate as to whether this was true or not?

A. Yes sir. I did not go into it very deeply.

Q. Did you go into it at all?

A. To the extent that I have described.

Q. Now, as a matter of fact, Mr. Moore, is it not an open informed at the time these accounts were turned over, that no separate account was kept of the sales of goods sold by

Swofford Bros. Dry Goods Co. to E. M. Newton & Co., and did not the ledger show that?

A. No.

Q. Did the ledger show that there were separate accounts kept of these goods?

A. Simply showed the amount of the indebtedness.

Q. You knew that he had on hand a large stock of millinery and some $3000.00 worth of other goods?

A. At the time I took the assignments of these accounts, I do not know how much other goods he had.

Q. Had you not already separated your goods from those other goods? A. No sir.

Q. Did you separate your goods after you got the notes and accounts? A. Yes sir.

Q. Was it on the same day?

A. I think it was.

Q. You knew, then, when you got your goods separated that there was quite a stock of millinery and other goods that you did not claim?

137 A. I knew about the millinery all of the time. It is a very bulky goods, and cannot be mistaken for any goods in which we deal, except the ribbons and laces, but I didn't think he had so many of the other kinds of goods; was surprised at the amount of them when I found it out.

Q. When did you find it out?

A. I did not find it out until the Trustee had invoiced them, but I knew from our moving them out, and seeing them in a pile that there was a considerable amount, but did not know the exact amount.

Q. Was there anything on this ledger, or books, that you saw indicating that he kept but one set of books and accounts against his customers?

A. I do not think I saw but one book, and that was the ledger and I only saw that in a casual way, while in his possession, while he had it in his lap engaged in reading off his accounts. I never made an examination of his ledger.

Q. Then you found nothing to indicate that there was a separation of the goods you claimed, and the sales of them, from other goods? A. No sir.

On Re-Direct Examination, witness testified:

Q. In the question of insolvency about which you have been asked, Mr. Moore, state whether or not Newton admitting that he had been lying to you in his statements, would mean that he was insolvent? A. No sir.

Q. State whether or not, the fact that he owed a large amount, even if you knew the amount, whether that would necessarily mean that he was insolvent?

A. It would not.

Q. His failure to show you his books on demand, would that mean that he was insolvent?

138 A. Not necessarily.

Q. State whether or not his admitting that he had made a false statement, and his failure to show his books, would not show an insolvent condition, that would have caused you to have stopped doing business with him under his contract?

The Referee here states that witness has sworn to this twice before, possibly.

Q. Mr. Newton spoke of your having an agreement between yourselves that this contract of July 20th, 1904, should not be recorded, and should be kept secret; state whether or not you had any such understanding with him.

A. None whatever.

Testimony in this case not being finished, Court adjourned to 9 o'clock, September 1st.

E. S. Ellis, recalled, testified as follows on Direct Examination:

Q. State what opportunity E. M. Newton had of knowing the contents of the statement attached to his bankruptcy petition?

A. E. M. Newton, his attorney Mr. Searcy, Mr. Webber and myself were all sitting around a flat top desk, in Mr. Webber's office when the matter was discussed, and after the matter had been written out by Mr. Webber, it was read over by him, and read sufficiently loud, that I, who am partially deaf, could distinctly hear it. Mr. Newton was as close to Mr. Webber as I was.

Q. About what distance were the parties whom you named separated?

A. Probably the greatest distance any two of them were apart was six or eight feet and of course they were nearer to each other, as they sat around a desk. The extreme would be eight feet.

Q. State what discussion you had about the facts stated in that statement?

A. As I stated before the matter came up, but when they reached that point, while I am not positive, my impression is all the while that it was Mr. Searcy who asked
139 me what my judgment was as to whether the claim of Swofford Bros. should be stated in the petition. I am not sure what his language was exactly, and am not sure that it was Mr. Searcy, but some one in the room called my attention to the matter, and asked my judgment and after giving the matter a moment's consideration, I was impressed with the idea and said so, that the petition should state the whole facts, and I suggested attaching the original contract and the assignment, showing just what notes and accounts were transferred, but on account of the length of the assignment, and the exhibits attached to it, it was thought better to abbreviate the statement, which was finally done.

Q. Mr. Newton states that he talked with you twice about these notes and accounts. State whether you had any conversation with him in regard to them?

A. Mr. Newton's statements in regard to that matter are unqualifiedly false. I had no conversation with him regarding the notes and accounts, or as to what they represented.

On Cross Examination, witness testified:

Q. Mr. Ellis, did they begin to prepare this petition in bankruptcy in the afternoon of July 3rd, 1905?

A. My impression is that they commenced working on it some time in the forenoon, but most of the work was done in the afternoon.

Q. What time was it completed?

A. Some time in the afternoon, probably the latter part of the afternoon, four or five o'clock.

Q. I notice that it was filed at 5:30 P. M. How long before that had it been completed?

A. I don't think I was present when it was completed. I don't remember as to its being signed, or the conversation connected with it being completed. Don't think I was present.

Q. What is the distance from Mr. Webber's office to the Referee's office?

140 A. About two blocks.

Q. Is it not a fact that this petition was prepared and signed very hurriedly?

A. I think not. They worked on it all day; no more hurriedly than any other petition was made out; it was very

largely from a form book, and it was a mere matter of typewriting.

Q. Were the two Newtons there all the time?

A. I don't remember whether John Newton was around at all. I was in and out of the office several times during the day, and most of the time E. M. Newton was there, but I myself did not stay close in the office while this petition was being prepared. I was engaged in some other matters.

Q. Were you there when it was signed by the two Newtons?

A. I have no recollection about the signatures to the petition, and for that reason do not believe I was there. I don't remember the act of signing it up or swearing to it.

Q. Were you there when it was finished and put together?

A. I don't know as to that. I was in and out several times. I had two stenographers working for me, one there and one at the hotel and I divided my time between them.

Q. Now, did you say that you heard this petition and the exhibits read over to Mr. Searcy, and to the two Newtons?

A. No sir, the only part of that petition that I heard read was the part relative to the claim of the Swofford Bros. Dry Goods Co. about which I was asked. They asked me about it, and I made some suggestions, and I remember distinctly of Mr. Webber's reading it over because I had insisted that the assignment of the accounts, with the exhibits, be put in in full, and he and Mr. Searcy thought that it would be too cumbersome. Mr. Webber wrote it out and read it to me and Mr. Searcy for the purpose of our knowing what he had written. Mr. Newton went out and came back and gave me the figures which are put in the blanks with pen and ink.

141 Q. Did you not have to send for Mr. Newton to get him to come up there and give you these figures?

A. No sir. Mr. Newton was there and went out to his office, I suppose, that's where he said he was going, to see the books, and get these statements.

On Re-Direct Examination, witness testified:

Q. State if there is anything in the statement in connection with the Swofford Bros. claim different from what was talked over in the discussion in connection with it. In other words, did George Webber put anything in that statement which was not fully understood?

A. There was nothing in the statement but what was fully talked over, and in exact accordance with the suggestions

I made, or the dictation, if you please to call it that, to Mr. Webber, at the time it was written out. I do not think the language exactly follows my language, but it follows exactly the ideas I expressed.

On Re-Cross Examination, witness testified:

Q. Now, Mr. Ellis, you say there is nothing in that statement except what was fully talked over and agreed upon; do you mean to insist upon this answer being true?

A. What I mean is this: I do not mean to say that there was any formal agreement as to what language should be used. I had no interest in the petition or its preparation, my opinion was asked and expressed my opinion as to how that statement should be made up, and I openly stated my ideas about it, and Mr. Webber wrote it out, following the suggestions that I made in regard to it. I made them openly in their presence, and no one objected to them, or to what was written or read, and what was stated and was signed.

Q. Do you mean to say that Mr. Searcy agreed to that part of this statement which implies that the notes and accounts assigned to Swofford Bros., was the proceeds of goods which Newton & Co. had sold that he had obtained from
142 Swofford Bros.?

A. No sir. I mean just what I say; that in Mr. Searcy's presence this matter was talked over and was written out. I do not remember that Mr. Searcy said yes or no to it. He was there. I gave my suggestions and they were written out. Whether he expressed himself or not, I am not sure, but I know he did not object to it in any way openly, or say anything, otherwise. Mr. Webber would not have written it out.

Q. Do you mean to say that the question of whether these notes represented the proceeds of goods which had been bought from Swofford Bros. was discussed with Mr. Searcy, and that it was then put in this agreement as you have written it after that discussion on that question?

A. I mean to say that at the time that statement was dictated, I suggested that the assignment itself, as signed by Mr. Newton, should be included as a part of that statement, that the assignment and the exhibits attached to it should make a part of that statement. That was my idea, and instead of that being done, the petition simply states the facts

recited in that assignment. There was no attempt at concealment. I had no interest in the matter. It was unimportant to me whether anything was put in or left out.

Q. You have said twice that you had no interest in the matter, yet in your former testimony, you stated that you insisted on the claim of Swofford Bros. being listed, and the facts stated in regard to the transfer of the accounts and goods, etc.?

A. I think you are incorrect as to my former testimony. I never said or meant to say that I insisted on its being in at all. Mr. Searcy testified that I insisted. I did not so swear.

Q. Why did you dictate to the stenographer what was to be put in the Schedule A with reference to the Swofford Bros. claim, if you had no interest in it?

A. Merely because I was asked to do so. Was asked for my advice on it, and I gave it. As I stated before, I did not dictate, or mean it. I merely made suggestions and
143 Mr. Webber embodied them in the statement. The statements were drawn up very largely upon the suggestions that I made. I was not attempting to dictate its precise language at all.

Q. State who did frame the language in which the statement is made, if you did not dictate it.

A. The language contained in that statement is the refletcion, very largely of what I said at that time. The latter part of the statement in regard to what was done with the notes and accounts follows very closely the language of the assignment itself, and it is possible that it is a substantial copy of the assignment. We had the assignment there, and my suggestion was that the assignment itself, or a copy of it, should be attached in order to show what had been done.

Q. You have not stated who framed the exact language of this statement?

A. I don't know. I told you how it was written out. I don't know whether Mr. Webber tried to follow my language or not, but I do say that the statement as made is in my expressions, or rather comes very closely to expressions that I made, or the suggestions that I made at that time.

Q. Were you present when it was written out?

A. Yes. The writing of that statement occupied three or four or five minutes.

Q. It necessarily follows that if you did not frame the language that George Webber did, does it not?

A. I think in writing it that Mr. Webber tried to follow

out what I had said, though in writing it I can say that it is not exactly the language that I would have used in dictating the statement, but the ideas follow very closely to what I said, and in that it follows very closely the ideas expressed by me and the suggestions that I made, as to what it should contain, it might perhaps be properly said to be my dictation.

144 Q. I have very distinctly understood you to say that the ideas that were embodied in the statement were yours, but I have been unable to get you to say whose language was used in writing up this statement?

A. I think I stated the other day that the ideas were mine, and that the language was that of the man who was running the typewriter.

Q. Who was operating the typewriter?

A. Mr. George Webber. I so stated the other day, that M. Webber operated the typewriter, and that while I gave my ideas and impressions that he followed them in language of his own, but there is nothing in the statement that was not fully expressed by me.

George Webber, being first sworn, testified as follows:

Q. State your connection with the preparation of the Bankruptcy Petition of E. M. Newton & Co., filed herein?

A. I went with Mr. Searcy to my office, and I have forgotten now whether that was in the morning or the afternoon. We had discussed Mr. Newton's situation, and had decided that it was best that he go into bankruptcy, and Mr. Searcy informed me that he had agreed to go into voluntary bankruptcy. I suggested to Mr. Searcy that he come to my office, and I would assist him in the preparation of the petition; that we had a typewriter and the necessary blanks. Mr. Searcy, as I understood it, came over from home in response to a phone message from Mr. Newton for the purpose of filing the petition. We had a girl stenographer who at that time was engaged in making up copies of the notes and accounts, and copies of some other papers that were desired to be used. In order to facilitate matters, and for Mr. Searcy's accommodation, I took a typewriter, and undertook to draw up such of the papers as were not being drawn up by the stenographer. I had no other connection with it, excepting in the capacity of a typewriter.

145 Q. State under what circumstances the statement explaining the Swofford Bros. claim was put in the petition?

A. When we reached Schedule A, Newton having parted with a portion of the property claimed by Swofford Bros. in this action, the question naturally arose as to what statements should be made of the matter in the petition. Mr. Searcy and I discussed it, and my recollection is that we agreed that it might properly be left out of the petition, as Newton had parted with the goods and Swofford Bros. claimed its debt to be satisfied by the delivery of the property. My recollection is that Mr. Ellis, who is the attorney for Swofford Bros. came into the room, and hearing a part of the discussion, made the remark that if a statement as to these goods and the debt of Swofford Bros. were omitted, that it might be thought that it was an effort to conceal the transaction, and I remember distinctly that he used the expression in connection there with, "Swofford Bros. have nothing to conceal." Mr. Ellis insisted that the petition in bankruptcy should state that these goods were turned over under the contract, and also that the statement in the petition should be full and clear. Now, at this point, as I was operating the typewriter, I think it is very likely that it was I, who said to Mr. Ellis, that if that was his idea to please say how the matter should be presented. As I recollect it, it was discussed and Mr. Ellis made suggestions, partly dictating it, and I wrote, and I don't know, but I think possibly that several corrections were made as I went along. After finishing that part of it, I remember reading the statement over to Mr. Ellis and Mr. Searcy and Mr. E. M. Newton to see if I had embodied Mr. Ellis' ideas. I recall that when we got down to the representation in the statement of the amount of the merchandise sold and the amount of credits under the contract, that we were compelled to leave them blank, and sent Mr. Newton to get the figures. He came back with the statement of the amount of goods sold, but did not get the amount of credits at that time, and I observe that the amount is still blank in the petition. As Mr. Searcy has stated, he and I assembled the papers and bound them
146 together and I took the affidavits of both Newtons. In doing so, I asked them if they cared to read the petition over, and I remember that Mr. E. M. Newton said "no, that he had heard it, and "guessed it was all right" and he thereupon signed it. This is the first time I have seen the petition since it was filed, and while the major part of it, I see, was written by me, I observe that some of it was written by the stenographer that we had at that time. I wrote the explanation of the Swofford Bros. claim, and wrote only

what was freely discussed, being the result of a decision to present the facts.

Q. What, if anything, was said during that discussion, by any one as to the filing a copy of the contract of July 20th, 1904, and a full copy of the assignment, with the names and amounts, etc. of the notes and accounts attached thereto in the original?

A. Mr. Eilis not only insisted that the Petition in Bankruptcy state the facts, but also insisted upon attaching a copy of the contract between Swofford Bros. Dry Goods Co. and E. M. Newton & Co., which he had the stenographer make, and he also wanted to attach a copy of the notes and accounts turned over to Swofford Bros. My recollection is that he set the girl to making these, and was apparently very much disturbed when he found she had made but two copies, and as it was getting too late to make them again, this was omitted.

Q. You spoke of two, how many did he want?

A. Wanted three to attach to the three petitions, I suppose.

Q. You spoke about Mr. Ellis insisting upon the explanation going into the petition; do you mean by this that he insisted upon the full explanation, or what do you mean that he insisted upon, as near as you know in regard to it. In other words, did he suggest it, and was his opinion asked in regard to it?

A. As I have stated, Mr. Scarcy and I discussed the matter and decided that it should be left out all together. I think that I called Mr. Ellis and asked his opinion. I am not
147 sure about this, but at any rate, he was asked about it, and it was then that he suggested a full and complete explanation in order that it might not be thought, as he expressed it, there was an effort to conceal the transaction.

Q. Now, I will ask you about another matter. State whether or not you were present at the time that Mr. Newton was delivering goods under the contract to Mr. Moore, for the Swofford Bros. Dry Goods Co.?

A. I was present a part of the time. I went to Newton's place of business with Mr. Moore, at the time that the goods were to be delivered and I remained there until the process of elimination of goods other than the Swofford Bros. goods was fairly under way.

Q. State whether or not Mr. Moore was willing to accept,

or did accept goods other than those bought under the contract of July 20th, 1904?

A. When we first went into the room, about the first table we struck had a lot of hosiery on it. Mr. Moore had said to Newton that he wanted him to point out their goods. We got to this first table and Mr. Krause raised the question as to whether or not the socks, of which there was a large pile, had come from Swofford Bros. Newton remarked that they might just as well take them. He was then informed that we were there to get the goods of the Swofford Bros. Dry Goods Co., and we wanted only these goods; goods that he knew to have come from Swofford Bros. I myself informed him, as well as Mr. Moore, that if there was any doubt in the world about an article, that we did not want it, and it should be removed to the other room. I noticed a tendency on Newton's part to want to give Mr. Moore goods other than those bought from Swofford Bros. and in no instance while I was present was Mr. Moore or I anythink less than very emphatic in the statement that we must confine ourselves to Swofford Bros. goods. I believed then and subsequently learned that there was probably a motive for this ap-
148 parent generosity on the part of Mr. Newton, but know nothing of it to my own knowledge.

Q. In your answer you speak of the goods of Swofford Bros. which it was desired to take, and these only. State whether or not you refer to the Swofford Bros. goods generally, or those bought under the conrtact of July 20th, 1904?

A. As I understood the matter of the goods, at that time, they were goods bought under that contract.

On Cross Examination witness testified as follows:

Q. You did not know whether they had been bought under that contreat or not, did you?

A: No. I knew nothing about it except from statements of Mr. Newton and Mr. Krause, who were present.

Q. Are you one of the attorneys for Swofford Bros. in this case? A. I am now.

Q. Were you acting as the attorney for that company, and did you advise Mr. Moore from time to time during the period when the goods were being separated, or when the goods were being selected and turned over to Swofford Bros. by E. M. Newton & Co. on or about June 30th, 1905?

A. I did.

Q. You were one of the attorneys for this company at the

time the petition in bankruptcy was prepared and filed, were you not?

A. I did not know. Mr. Moore, the secretary, as I understand, of Swofford Bros. Dry Goods Co., caused his general attorney, Mr. Ellis, to come here. Mr. Ellis came to my office, and talked with me about the matter. I did not know at that time whether Mr. Ellis would take control of the entire case or not. In fact, I had no arrangements, but supposed that I would be employed as an attorney in the case.

Q. Did Mr. Ellis dictate to you, while you were writing on the typewriter, that part of the Schedule A of Liabilities, following the listing the claim of Swofford Bros.?

149 A. I don't know that you could call it dictating.

The form in which the matter should go into the petition was openly discussed and I would not undertake to say that each and every word in that statement were words from the mouth of Mr. Ellis, but I do know that the sum and substance of it, is the result of the suggestions made by Mr. Ellis, with perhaps a few suggestions from others in the party at that time, but I am quite confident that each and every material portion of the statement was freely discussed.

Q. I call your attention to the following language: "On the same day (meaning the 30th of June) in pursuance of said contract, we assigned, transferred, and delivered to said Swofford Bros. Dry Goods Co. said notes aggregating the sum of $1684.32; and certain accounts aggregating $8277.04, due and payable to us, for goods of the said Swofford Bros. Dry Goods Co." Please state whether you employed the language in the quotation made, or whether the language was dictated by Mr. Ellis?

A. I have fully covered this in my previous explanation, and I can add nothing to it in regard to that particular language. However, I desire to say this in connection with that, that all of the other language used in the statement, if there was any desire or effort on the part of Mr. Ellis, or any body else to gain any advantage by reason of the language employed in that petition, I was wholly unaware and unconscious of it. I considered them, and consider now, that the language used in that statement was merely descriptive of what Newton had done, or had claimed to do.

Q. It is with you, Mr. Webber, to answer the question or not. If you decline to say whether it was your language or that of Mr. Ellis I will not further insist upon it, but I would like for you to say whether you will or will not answer it?

A. I have answered this question by saying that I cannot say that those identical words came from the mouth of Mr. Ellis, but I will say that if not those identical words, the language there expressed the suggestion of Mr. Ellis in describing what had taken place.

150 Q. Did you know that Mr. Searcy was representing creditors of E. M. Newton & Co. when he came to Texarkana, not only himself, as a creditor, but others?

A. My recollection is that Mr. Searcy told me that he had some claims against Newton. Among others he was an endorser along with B. P. Wheat and J. B. Merriman on a $2,500.00 note of Newton's.

Q. State whether Mr. Searcy knew that the language I have above quoted was incorporated in said schedule?

A. It is impossible for me to state what Mr. Searcy knew. I don't know. He has stated that he did not know, and I therefore suppose that he did not.

Q. This petition in bankruptcy with its exhibits, covers about 23 pages, typewritten pages. State whether that petition was read over by the bankrupts at the time same was signed up and sworn to?

A. As I stated, they declined the pleasure. I asked them if they wanted to read it, and I am very sure that Mr. E. M. Newton replied that he had heard it, and did not want to read it, or words to that effect.

Q. Were you present at the time an agreement was made on the 4th day of July, 1905, between the Referee and Reciver in Bankruptcy, on one part, representing the Newton side, and Swofford Bros. Dry Goods Co., on the other, representing themselves, by attorneys?

A. I was present when that agreement was drawn up, and came with it to the Referee's office in company with Mr. Ellis.

Q. Was that agreement written in your office?

A. It was, to the best of my recollection.

Q. At that time, were you one of the attorneys for Swofford Bros.?

A. Not that I knew of, definitely, but as stated, I supposed that I was to be, not knowing anything about Mr. Ellis' relations with the case.

Q. In your conference with the Referee and Receiver, did you or Mr. Ellis represent to them that the notes and accounts which had been assigned to Swofford Bros. were the proceeds of the sales, by Newton & Co. of goods which

151 they had purchased from Swofford Bros. under the contract of July 20th, 1904?

Counsel for the Intervenors enter an objection on the ground that nothing was said about this in the Direct Examination.

The Referee rules that Mr. George Webber's testimony, direct, was in reference solely to the preparation and transfer of the petition, and transfer of the goods, and that the question asked is not competent on Cross Examination.

Q. You have testified in regard to having advised with Mr. Moore and what took place in the store when the goods were being separated and turned over, were you also present when the accounts were separated?

A. I do not believe that I was. I cannot remember definitely about this from the fact that Newton brought his ledger down to my office to check the accounts up, then took it back to his own place, back again to my office, and finally I don't know just where that was done. He started to check them off in my office. I remember now perfectly that these things were checked off in my office by Newton and a list made up by Mr. Moore as Newton called them off. I was in and out, but took no part in this at that time.

Q. What books did Mr. Newton have in your office when this transaction happened?

A. He brought two, I think. One was a ledger, and I don't remember what the other was. I did not notice it in fact, as I did not handle the books, and had nothing to do with this part of the proceedings.

Q. Did Newton call the accounts from the ledger?

A. I think, in fact am quite sure that he had something else that gave him not only the amount of the account, but the date of sale; terms of sale and Post Office address of the debtors. This, I feel satisfied was not furnished by his ledger, and what else he had I don't know, unless it was a blotter of some kind.

(Here examining the ledger, witness says): I see there
152 are no Post Office addressed on the ledger. This ledger has the terms and amount, apparently. That is the ledger for 1905 that I had in my hand, but the ledger just preceding it is of the general form, and has none of this data as far as I can see.

Q. I also hand you a collection book of E. M. Newton &

Co. Please state if that is the other book that was in your office, with the ledger?

A. I cannot positively identify this book having been there; from the fact that it contains Post Office addressed, and other data incorporated in the assignment to Swofford Bros. I suppose that it is the book.

Q. Please read out what it does show as to data incorporated in the assignment to Swofford Bros.

A. Shows data of sale; name of the debtor; Post Office address; terms; date due; together with the amount; there is a column showing whether paid or not, and also a column for remarks.

Q. Then the books that were in your office showed the names of the debtors, the amounts, when due, Post Office addressed, terms of sale, as to when the debt should be paid?

A. Yes, these books do. I don't know what else that they had, but Mr. Newton passed back and forth between his office and mine, during the time and got such information as was desired.

Q. Did you, or Mr. Moore, or Mr. Krause, or any one else, or Mr. Newton, suggest, in turning over these accounts and notes, that the best should be selected?

A. I don't know that. I did not.

Q. Do you know whether the best accounts and notes were selected or not?

A. I don't think there was any best to them. I don't know. I do know that the list that Mr. Moore ultimately got were accounts scattered around through the country, in places of which I think I can safely say I never heard of 75 percent of.

153 Q. What about those that Mr. Moore did not get? Had you heard of seventy-five percent of those places?

A. No.

Q. Do you know what the Trustee has collected on the notes and accounts that Swofford Bros. Dry Goods Co. got, and on those they did not get?

A. I am not advised of this. In fact, I saw yesterday on one of the ledgers, a pencil memorandum of collections made by the Trustee, but I don't remember what it was, and really paid little attention to it, except to note that he had made some collections. This is the first and only notice of any kind of character I have had thereof, or of the other notes and accounts. I have not been present here during the examination of witnesses when anything was answered regarding this.

Q. Did you write the assignment of the notes and accounts, a copy of which is attached as Exhibit B to the Intervention? A. Yes, I did write it.

Q. Did you examine that ledger and the collection register of Mr. Newton, while it was in your office?

A. I did not. The first time Mr. Newton brought the ledger up there, I staid by him for a few moments, and he had the ledger upon his knee, and I do not recall having seen the book open any other time.

Q. Did you, or any one else, inquire of Mr. Newton, whether he kept a separate account of goods which he sold that he had bought from Swofford Bros.?

A. I made no such inquiry, and know of none made.

Q. Did you learn, at that time, or any other time prior or subsequent, that Mr. Newton did not keep a separate account of goods that he had bought from Swofford Bros., and that he had sold to his customers?

A. I don't know positively anything about it. I have been informed since that he did not. At the time these
154 notes and accounts were turned over, I had practically nothing to do with it, and I do not believe that I was present, further than to advise Mr. Moore to have the notes turned over to him endorsed to Swofford Bros. and I was called on to draw up the assignment referred to as Exhibit B of the Intervention, and nothing was said, at that time, either by Mr. Moore or by Mr. Newton, in conflict with the language employed in the assignment.

Q. You say you have been informed since that time, that no separate accounts were kept on account of goods sold by Swofford Bros. From whom did you get that information?

A. I thing that information came to me in the statement from Mr. Searcy. I will not be positive about this, but it was either on the day, or since the filing of the Petition in Bankruptcy.

Q. Did Mr. Searcy tell you that no separate accounts had been kept of the goods which Newton sold to customers, which he had bought from Swofford Bros.

A. I think that he did. I don't recollect positively about this. Mr. Searcy and I had quite a number of conversations about this matter and I would not be sure that he was the first one to bring up the question.

Q. From what other person did you receive similar information?

A. Why that matter has been talked of frequently, not only on the outside, but here in Court.

Q. Did you hear a part of Mr. Newton's testimony yesterday, in which he referred to this assignment, and stated that according to his idea of the language used, that it did not mean to say that the accounts and notes represented goods which had been sold by Newton & Co. which they had bought exclusively from Swofford Bros.

A. I did not hear his testimony, not being present.

Q. Did you have a conversation yesterday with Mr. Searcy on the language used in this assignment?

A. Not that I recollect of.

155 Q. Did you not, at the head of the stairway leading to the Referee's office, say to Mr. Searcy, yesterday, in referring to the language used in that assignment of notes and accounts was that it had been written that way by you purposely, so that it might bear different constructions?

A. Mr. Searcy evidently misunderstood me. I made the remark to him that I drew the assignment in the language in which it was couched intending for it to express just what it expresses on its face. I remember that Mr. Searcy, either prior to, or subsequent to this statement by me, made the statement that the assignment was capable of two constructions. My answer, however, did not refer to that. I did not so intend it.

Q. Did he tell you that it was subject to two constructions, and did you, in response say that it had been drawn up that way by you on purpose?

A. As I have stated, I did not mean to so impress Mr. Searcy, and I think that I told him first that the assignment could not bear the construction indicated on its face; that I did not see how it could be construed otherwise. When I drew up this assignment, I think that it was on a typewriter in Mr. Newton's office, he and Mr. Moore, and perhaps Mr. Krause being present. I was there only a few moments. I wrote the assignment, read it over, and asked Mr. Moore if that was satisfactory and Mr. Newton heard it and signed it. I have not seen it since, to read it, that I know of, until it was handed to me a moment ago by Mr. Arnold.

Q. Did you not advise both Mr. Moore and Mr. Krause, at the time of these notes and account being turned over, that they would not be able to hold them, for the reason that it did not appear from the records kept by Newton; and was it not a fact that these notes and accounts represented the

proceeds of goods sold by Newton & Co. of goods which he had bought from Swofford Bros.?

156 Counsel for the Intervenors enter an objection to this question because it is incompetent, irrelevant, and calls for a statement from the witness of a professional opinion, to a client.

This objection was overruled by the Referee on the ground that the witness, in this Direct Examination was asked principally and chiefly in reference to these notes and accounts, and the Trustee in Cross Examination has the right to ask the witness in regard to any conversation, or any advice that he gave the Intervenors herein in reference thereto.

Witness here interposed the following objection, as an attorney for the Intervenors:

Witness objects, as an attorney in the case, to answering this question, for two reasons, first: The question relates back to a time when Mr. Newton was not present, and about which I have been questioned, as far as I recall, on Direct Examination, and second: The witness claims the exemption as an attorney from disclosing the privileged communication to his client.

This objection was overruled on the ground that his Direct Examination was in reference to this assignment and on the ground that the witness has testified in this examination, to the effect that he was not in fact the attorney for Swofford Bros. Dry Goods Co.

Witness further explains his attitude as attorney to Swofford Bros. Dry Goods Co., as follows: When I stated in my examination that I did not know, at the time Mr. Ellis was here, that I was to be employed finally in this case, I stated the facts. I was Mr. Moore's attorney, in the first instance at the time that the delivery was made of the goods, notes and accounts, and at the time to which the question relates. Upon leaving here, Mr. Moore asked me to submit him a bill for services to date, and I did not know but that that ended my connection with the matter, not having any definite advice from Mr. Moore, or any definite arrangement to the contrary. A bill was rendered for these services, and to be perfectly frank about it, owing to the fact that I did not take the matter in hand our relations to the case, have, to
157 my mind, been doubtful up until the time Mr. Ellis came down here at this time. Mr. T. E. Webber was

out of town, and in his absence I was consulted, in the first instance by Mr. Moore. Scott & Head were also consulted in the first instance about the case, and a similar course taken with them. I learned, afterwards, through Mr. Head, that he had been informed that that was the end of their relation to the case.

Q. Are Scott & Head now in the case representing the Intervenors? A. They are not.

Counsel for the Trustee states that in statement with reference to the relations of attorneys, he would not insist upon an answer to the question.

Witness states: Since that question was asked, I want to say this: I have testified here as to what I knew, or believed I knew, about different matters, but I may have had personal opinions, but they were not in accordance with my knowledge.

Q. What do you refer to in having an opinion on some matters? Do you refer to the notes and accounts representing goods that Swofford Bros. Dry Goods Co. originally sold?

Counsel for the Intervenors enter an objection on the ground that it is immaterial as to what his opinions were. The Court ruled that this question is immaterial.

Leo Krause, recalled, testified on Direct Examination, as follows:

Q. You are the Leo Krause referred to as the salesman of Swofford Bros. Dry Goods Co., are you not?

A. I am.

Q. State whether or not you did the writing of the inventory of E. M. Newton & Co.'s goods which they delivered to Swofford Bros. as goods sold to them under the contract of July 20th, 1904? I hand it to you, for your examination.

State if that is the original inventory taken?

158 A. Yes sir.

Q. Mr. Newton states that in taking these goods, there are included in that inventory a large lot of goods bought from firms other than the Swofford Bros. Dry Goods Co. and that he attached this memorandum list of such goods, with an explanation as to the others. Please compare this list so made out by Newton, with the original inventory, which you have in your hand, and with the invoices which

Mr. Newton has attached, and state whether or not these goods are the Swofford Bros. goods?

A. I stated in my testimony before that to the very best of my knowledge and belief, and after most careful examination of almost every item that I accepted for the Swofford Bros. Dry Goods Co., as goods sold by them since the making of the contract of July 20th, 1904, were the identical goods, and I now repeat this statement that I still think that every item I accepted was goods belonging to the Swofford Bros. Dry Goods Co. of goods sold to E. M. Newton & Co. under our contract. I note the items here, for instance, there is a lot of baby ribbon with the list. We, the Swofford Bros. Dry Goods Co., carry a line of baby ribbon that we ourselves also list and number as No. 33, but I do not think that the baby ribbon here taken had any special lot number on it, for the number would be marked on the box in which the ribbon is packed, perhaps 25 to 50 spools in a box, and Mr. Newton and myself together separated this ribbon from a lot of other ribbon, and we both agreed that this particular ribbon was ribbon purchased from the Swofford Bros. Dry Goods Co. I have looked over the list carefully, and while it is impossible to carry in mind the list of identical lot numbers, I still state positively, that to the very best of my knowledge, all of the goods I accepted, was goods sold by Swofford Bros. and this includes the list of goods handed to me, made out by E. M. Newton.

Q. Referring to this list again, I call your attention especially to a lot of knee pants. Please state whether or not these were identified as goods of Swofford Bros.?

159 A. These knee pants in question were a lot composed of various lot numbers and not of one certain lot. I first refused to accept them and told Newton that some of them I recognized as ours, and some of them I did not. He told me positively that these were a lot of odds and ends, what we consider a job lot, and he bought all of them from our Mr. Powell of the Swofford Bros. Dry Goods Co.

Q. In the case of a questionable or doubtful lot of goods, state what conversation, if any, occurred between you and Mr. Newton, as to these goods?

A. Whenever we had any doubts about any class of goods, we would give the benefit of the doubt to the other creditors, and set the goods aside and carry it out from the room where our goods were kept, and place them in the room across the hall.

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Q. I will ask you now, if Mr. Newton was informed by you or Mr. Moore, in your presence, that no goods were wanted except such as he could identify and swear to, if necessary?

A. He was at least a dozen times, almost. He would persist in a way of showing friendliness, of trying to get us to take some goods that were not ours, and I myself repeatedly told him that I could not and would not accept anything except such goods as we could positively swear to, to the best of our knowledge, as being ours.

Q. Mr. Newton states that goods were taken in that lot, which had been sold by Swofford Bros. Dry Goods Co. before the contract of July 20th, 1904. State whether this is true or not?

Q. It is not true, to the very best of my knowledge. All the goods we took were goods sold to Newton & Co. since the making of this contract, and Mr. Newton told me himself as I testified before, that he used the Lewisville Supply Co. as a medium to unload all of the old goods, that he had bought while he was doing a retail business.

Q. Mr. Newton further stated that whenever goods
160 of a doubtful character were under consideration, that Mr. Moore, by mutual understanding, permitted these goods to be put in the Swofford Bros lot. Is that true?

A. It is not true.

Q. Please state what effert, if any, Mr. Newton made to obtain payment of money from Mr. Moore during this transaction?

A. Just at the time that this transaction was being made, there was nothing said by E. M. Newton about getting money that I know of, but a day or two afterwards, Mr. Newton seemed to think that the Swofford Bros. Dry Goods Co. were under great obligations to him, by reason of his having lived up to the contract, and had given peaceable possession, and had turned back the goods, and insisted and asked me several times to see Mr. Moore and get Mr. Moore to let him have some money. He also asked me to try to get Mr. Moore, before the goods were sold, to agree to do something for him; to agree to resell him a certain amount of the goods in case Swofford Bros. bought them in. In every instance, without, or before even seeing Mr. Moore, I told him that Mr. Moore would not, and could not, promise him anything. At one

time, in my presence, Mr. Newton said to Mr. Moore: "Now, Mr. Moore, that I have turned these goods back to you, and turned you over these notes and accounts, what are you going to do for me?" Mr. Moore replied, "I am not in position to promise anything. I don't know what the future may disclose, but I can say to you, that I would rather help you than hurt you."

Q. Did Mr. Moore, at any time, ever make any promise to Mr. Newton?

A. He did not, that I know of, but, on the contrary, he has, whenever the subject was broached in my presence, positively refused to make any kind of a promise whatever.

Q. Did Mr. Newton ask you to go to Mr. Moore, in his behalf, to obtain a promise from Mr. Moore?

A. He did.

161 Q. State, if at any time Mr. Newton claimed to you that Mr. Moore ever had made him any promise?

A. He did not.

Q. State whether or not E. M. Newton told you after the purchase of the millinery stock by Rosenthal Sloan Millinery Co., and he was installed as manager of the new concern, that he was to get that stock as soon as it had been paid out and that the dividends received by Rosenthal Sloan Millinery Co. in this bankruptcy, would go as part payment of the purchase price.

A. He did. He told me that both before we sold the Millinery to the Rosenthal Sloan Millinery Co. and after we sold it back to them. In fact, Mr. Newton and myself had quite a long conversation along that line. When we bought the entire stock, Mr. Haskell represented the Rosenthal Sloan Millinery Co., and wanted to buy it back from us, and the fixtures, at the prices that we paid for them. I refused to accept that amount, as we considered that we ought to have a profit on the sale, as we would on any other bunch of merchandise that we might buy. I wanted $2000.00, and Haskell offered me, I believe, $1250.00, or something in the neighborhood of that. Mr. Newton then came to me and asked me to use my influence with Mr. Hanna, and see whether, as the agent for Swofford Bros. he would let Rosenthal Sloan Millinery Co. have the goods as cheap as possible. I asked him pointedly: What is it to you how much Rosenthal-Sloan pays? Where do you come in? If I sell these goods to you cheap, will you get any benefit out of it? He said, Yes, sir, Mr.

Haskell agreed that if you would turn this stock over to him, he would incorporate a company, place me back in business, and that if I paid him back the purchase price of $3,000.00 he would then turn the stock over to me. I asked Mr. Newton if the $3000.00 was not rather a big sum for him to pay for the use of $1500.00; and I advised him not to make a deal on that basis; that he would be placing himself in as bad a fix as he was before; that this stock was not worth $4500.00. He said, Well, I will not be paying $3000.00,
162 for they agree to credit this $3000.00 with whatever they get out of the bankrupt court as a dividend. I then asked him what assurance he had that they would carry out their part of the agreement, and whether the agreement was fully and thoroughly understood. Yes, he said, but if you say so, I will go down to the hotel, talk the matter over with Haskell, and come back and let you know. In the meantime, of course, do not turn this stock over to them at any price, until you see me. He came back and said they would pay $1500.00 for the stock, and asked me to let this stock go at that price, as a favor to him, Newton; that they agreed again that if I would turn this stock over to them, for $1500.00, they would credit the $3000.00 which was the price they charged him for buying it, with the dividends obtained from the Court.

Q. Did he state whether or not that contract was in writing?

A. I said to Newton that promises are not always carried out. Have you got this in writing? He said no, but that he could get it in writing. I told him to go and get it, and he came back and told me that he had it in writing. Since that time he has been to St. Louis, and has informed me, on his own initiative, broaching the subject himself, that the St. Louis people approved of the contract and that he had this instrument in writing.

On Cross Examination, witness testified:

Q. Did I understand your testimony to mean, in the beginning of it on being recalled, that the items pointed out by Mr. Newton of merchandise turned over to Swofford Bros. Dry Goods Co., were in fact goods that had been sold by Swofford Bros. to Newton & Co., or whether there might be a mistake on your part, as to whether his testimony is true as to that or not?

A. I will state as before, that to the best of my knowledge these goods were the goods of Swofford Bros.

Q. Did you compare his statement showing certain items of goods that he claims had not been purchased from
163 Swofford Bros. with the invoices filed with that statement? A. I have.

Q. Do not these invoices show that these items had been purchased from other parties and do not the items correspond with the items shown on the invoices of other firms than Swofford Bros.?

A. Some of them do, and some of them do not, but as I said, I am not trying to identify number lots, and I am not testifying as to lot numbers. Mr. Newton would call out the lot number, and I would look at the goods itselt. He could have called any number he wanted to, and as stated, to the best of my knowledge and belief the goods itself were such goods as we sold them.

Q. Were these same kind of goods sold to them by other firms?

A. It could have been, but as I stated, to the very best of my knowledge, they were Swofford Bros goods. Of course there is no class of merchandise made that could not, perhaps, be duplicated by other firms.

Q. You base your judgment on the fact that Swofford Bros. Dry Goods Co. handled goods of this kind?

A. I recognized them as Swofford Bros Dry Goods Co.'s goods, as much so as any of the balance.

Q. Did you say that these goods had particular marks on them which would indicate that they were sold exclusively by Swofford Bros. Dry Goods Co.?

A. Some of them would, and some would not.

Q. When you and Mr. Moore were talking over the condition of E. M. Newton & Co. in Newton's office the morning before the goods were turned over to Moore, was there anything at all said about trying to effect a compromise of Newton's other indebtedness? A. I think there was.

Q. Please state in substance, what was said and who said it.

A. I think Mr. Newton first broached the subject, and asked whether or not we thought that a compromise could be accomplished with all the creditors. It seems to me
164 that I myself replied that there could be, if it were not for the fact that he had so many confidential debts,

and that these confidential debts, such as he would owe to parties who endorsed for him, could not be compromised, and that if he did compromise with the balance, he would still owe more money than he could possibly pay. If there was anything more said about a compromise, I don't know about it.

Q. What motive actuated Mr. Moore in turning over more accounts and notes than the contract called for?

A. I am not in a position to state what Mr. Newton's motives were. As far as I know, he was only favoring Swofford Bros. Dry Goods Co. to the extent of carrying out the contract he made with them. As to the goods, I have testified fully, and as to the accounts, I do not know but very little, if anything, about them.

Q. You say you do not know but very little about the accounts and notes; didn't you know that the accounts and notes did not represent wholly the proceeds of selling the goods by E. M. Newton & Co. that they had obtained from Swofford Bros. Dry Goods Co.?

Q. I have no way of knowing positively, and I don't know just how to answer that question. If the accounts were not kept separate I know, as stated before, from hearsay, and what Mr. Newton stated about the accounts when he turned them over to Mr. Moore. I did not know that they were the accounts from the proceeds of the sale of Swofford Bros. goods, nor could I say positively that they were not. I don't know.

Q. You noticed that there was only one set of books kept; was there not only one ledger?

A. Only one that I knew of.

Q. Did you say Mr. Newton selected the different goods which were turned over to Swofford Bros., on the ledger, and if so, when did this occur?

A. About the time, or within an hour after. That is my recollection about it. I don't know.

165 Q. As a matter of fact, did you and Mr. Moore not fully understand that there was no separate record kept of the proceeds of the sale of goods which Swofford Bros. had sold Newton & Co.?

A. I did not know it, and I don't know what Mr. Moore knew. As stated, I have not until this day seen Mr. Newton's journal, and from what I know of bookkeeping, the way he

keeps his books, the journal is about the only place, or whatever book he keeps in which he itemizes the goods sold, would be about the book which would tell whether these accounts were kept separate. I didn't know then, and I don't know now, nor have I known at any time what actual items were sold to the various customers whose accounts have been transferred. All I know is just what the ledger shows, and that only shows total amounts.

Q. They do not show that they are Swofford Bros. goods which make up the account? A. It does not.

Q. It appears to be a general account, for general merchandise, sold general customers?

A. It appears to be footing of the invoices of general merchandise sold.

Q. Are you familiar with the account against the Lewisville Supply Company? A. I think I am.

Q. State to the Court what goods, if you know, made up the largest part of that account, and whether anything of Swofford Bros. went into that account, or whether all of the account was for goods sold by Swofford Bros Dry Goods Co., sold subsequent to July 20th, 1904.

Counsel for the Intervenors enter an objection on the ground that it is immaterial and not cross examination, but is a part of his direct case, which objection was by the Referee overruled.

A. No. In fact I testified before, that Mr. Newton used this store to unload his retail goods, his odds and ends,
166 and I know that a portion of the goods, just what portion I don't know, was goods bought by E. M. Newton & Co. prior to the contract of July 20th, 1904.

Q. State what goods of Swofford Bros. went into that account that were not purchased by Newton & Co. after July 20th, 1904.

Counsel for the Intervenors enter an objection, on the ground that this is immaterial, which objection was by the Referee overruled.

A. I don't know what portion of the goods bought by Newton & Co. after the signing of this contract, was sold to the Supply Co.

Q. You know something more about that account than you have stated. Did you not tell me before, that that account was created by reason of turning over goods to the

Lewisville Supply Co. which had not been obtained by Newton & Co. from Swofford Bros under the contract of July 20th, 1904?

A. I did, and for that reason I have stated in my former testimony and just before this question was asked, that the goods sold to the Lewisville Supply Co. were mostly, it may have been all, for all I know, goods purchased by Newton & Co. from Swofford Bros. Dry Goods Co. prior to the contract, but I cannot state that there were any goods sold to the Supply Co. out of the stock bought after the signing of the contract. They might have bought some, and again they might not.

Q. You know that this account was made up of general merchandise selected from the store of Newton & Co., without reference as to whether they were bought from Swofford Bros. Dry Goods Co., or other creditors, originally, by Newton & Co.?

A. I know that the account was made up for goods that Mr. Newton was unloading, and that he had odds and ends left over that might have gone into that. I don't know.

Q. This account is one of those turned over by Newton & Co. to Swofford Bros. Dry Goods Co. on June 30th, 1905, was it not?

A. I have been told that it was. I have never par-
167 ticipated in the filing, but I have seen the account listed as one of the accounts that was turned over.

Q. Were you not present when Newton & Co. made an assignment on his ledger of this account? A. I was.

Q. Did you not know that he was assigning these accounts to Swofford Bros. Dry Goods Co.?

A. I knew that he was assigning a certain list of accounts, but I did not look at the list at that time.

Q. Was it talked over, between you and Mr. Moore, either at the time of the assigning of these accounts, or shortly afterwards, that they were made up from the general stock that Newton & Co. had on hand, and had sold to his customers?

Counsel for the Intervenors enter an objection to the question because it includes a double question, which objection was by the Referee overruled.

A. No sir. Mr. Moore did not say anything to me about the accounts. In fact, I myself, have been skeptical about the accounts in general. I did not think any of Mr. Newton's

accounts were worth very much, and had no conversation with any body about it, for I considered the assets of E. M. Newton & Co. only what merchandise I could see in the house.

Q. You have testified about what you considered and what you thought; state to the Court, if you did not consider of think that these accounts were made up of the merchandise of Newton & Co. which they obtained, not only from Swofford Bros. Dry Goods Co. but from other creditors?

Counsel for the Intervenors enter an objection on account of this being a question to state what he consideres or thinks, which objection was by the Referee sustained for the rule is that witnesses can only testify to what they know, not to what he thinks or considers.

Counsel for the Trustee asks that answer go down and be certified to the Court.

168 A. To be frank, I took it for granted that all of the accounts of E. M. Newton & Co. represented the amounts due E. M. Newton & Co. for merchandise, irrespective as to where they came from. I don't know, as I have stated before.

Q. What made you think, or consider, that these accounts represented sales of merchandise, without reference to any particular firm that Newton bought them from?

Counsel for the Intervenors enter an objection on the same ground as before, which objection is by the Referee sustained for the same reason as before stated.

Counsel for the Trustee asks that the answer go down and be certified to the Court.

A. For the season that he carried goods other than those furnished him by Swofford Bros. Dry Goods Co., and it is natural to suppose that he would sell some of it. That is, as a merchant, he would not buy one class of goods to keep, and one to sell.

Q. Is it not a fact that Mr. George Webber, the attorney for Swofford Bros. Dry Goods Co. advised Mr. Moore, and talked in your presence, that for the very reason these goods were kept together and mixed in that way, as the Swofford Bros. goods were not separated from others, that he told Mr. Moore that Swofford Bros. could not hold said goods?

Counsel for the Intervenors enter an objection on the

ground that it is an ingenious attempt to get from the client what he could not get from the witness ruled upon this morning, which objection was by the Referee sustained.

Counsel for the Trustee asks the Referee to have the witness answer the question, so that it may be certified to the Honorable Judge of the Court to test the relevancy and competency of the testimony, in view of the fact that Mr. Moore has testified that he did not know that the accounts were mixed, and that he did not know that Swofford Bros. goods were not kept separate from the other goods.

169 Q. Did you tell Mr. Searcy, in Mr. Newton's store on the 3rd day of July, you two being present, that Mr. Moore and yourself had been advised, on account of the accounts and notes not having been kept separate of goods which had been obtained from Swofford Bros. from other goods purchased by Newton, that you could not hold these notes and accounts for Swofford Bros.?

Counsel for the Intervenors enter an objection on the ground that this question is incompetent and irrelevant, which objection was by the Referee sustained.

Q. I will ask you whether you and Mr. Moore, at any time, discussed the question between you, as to whether these accounts could be held on account of their being accounts mixed up with other accounts, and being the proceeds of goods other than Swofford Bros. Dry Goods Co.'s goods?

Counsel for the Intervenors enter an objection to that question on the same ground as above, which objection was by the Referee overruled.

A. The only discussion I ever heard was between Judge Scott, George Webber, Mr. Moore and myself.

The Referee rules that witness need not tell what took place in that discussion.

On Re-Direct Examination, witness testified as follows:

Q. You were asked about the creation of the Lewisville Supply Company's account, I will ask you if your reply means that you refer to the opening or beginning of that account.

A. I did not. I refer to the account as it appears, and yet I did state that Mr. Newton told me that he opened this store for the purpose of unloading old goods in it.

Q. Now, at the time the account due Newton & Co. by

the Lewisville Supply Co. was assigned to Swofford Bros. Dry Goods Co., did you undertake to see whether or not that account represented the sale of Swofford Bros. goods since July 20th, 1904?

170 A. I don't know. I don't know what it represents, positively.

Q. What became of that account?

Counsel for the Trustee enters an objection on the ground that he did not know what became of it, which objection was by the Referee overruled.

A. It was compromised.

Q. For how much? A. For $500.00.

Q. By whom? A. By the Trustee.

Q. Now, Mr. Krause, is it not a fact that that account was compromised, you assisting therein, on account of the fact that the goods in possession of the Lewisville Supply Co., bought from Swofford Bros. Dry Goods Co. since July 20th, 1904, were not of sufficient value to justify you in holding out for a larger amount?

A. The entire stock was not of sufficient value, in my estimation, and opinion, the whole stock was not worth $500.00, and I thought a $500.00 compromise was the best thing to do.

Q. I pass to you Newton & Co.'s ledger of 1904, open at the Lewisville Supply Co.'s account, and also the ledger of 1905, open at the same account, and I will ask you to state what is the first item on this account in the ledger of 1904, at which time the account opens, what is the date?

A. August 27th, 1904, and the item is 75 cents.

Q. State now whether that account did not run through September, October, November, and December, 1904, and is then carried into the 1905 ledger, and runs through January, February, March, April, May and June, 1905? A. Yes.

Q. The account assigned to Swofford Bros., without asking you to wait to figure it out, represents the balance due on said account, does it not? A. It does.

171 R. L. Searcy, being introduced, on part of the Trustee, testified as follows:

Q. Did you have any communication with Mr. Leo Krause in regard to the notes and accounts which had been assigned by E. M. Newton & Co. to Swofford Bros. Dry Goods Co. either before or after said assignment was made on the 30th of June, 1905; if so, state when and where such conversations occurred.

A. Yes, Mr. Krause told me about the notes and accounts having been assigned on July 3rd, at Newton & Co.'s store, here in Texarkana.

Q. Please state what he said in that conversation in regard to said notes and accounts?

Counsel for the Intervenors enter an objection on the ground that the testimony is incompetent, irrelevant, and that the Intervenors would not be bound by any statement made by Mr. Krause. This objection was overruled on the ground that R. L. Searcy, witness on the stand, was attorney for the bankrupt, and as Mr. Krause was the agent or salesman for Swofford Bros. in this territory, I think the witness is competent and can answer.

Counsel for the Intervenors enter a further objection on the ground that it calls for a statement of a traveling man of a corporation, subsequent to the transaction to which it relates, and at a time when the traveling man was not engaged in the transaction of the business referred to, and asks the conversation between Mr. Krause and Mr. Moore, and his attorney, which was privileged, and this conversation did not take place in either the presence of Mr. Moore, the secretary of the corporation, or Mr. Webber, its attorney. This in addition to the objection of Mr. Webber. This objection was overruled on the ground as stated before.

A. Mr. Krause stated that he had no hopes whatever of holding the notes and accounts, because he stated that
172 when they were selecting them, that there was no way of telling what portion of these notes and accounts represented proceeds from the sale of Swofford Bros. goods, and that Mr. George Webber told them, meaning himself and Mr. Moore, at the time,—

Counsel for the Intervenors enter an objection to this answer, which objection was by the Referee overruled.

A. That there was no earthly chance to hold the notes and accounts.

Q. Did he state this more than once to you?

A. In a general way he has, yes sir.

Q. Mr. George Webber was asked in regard to the conversation he had with you at the head of the stairs leading to the Referee's office, please state whether you had a conversation in regard to the language of the assignment of the notes and accounts, copy of which is attached as Exhibit B

to the Intervention, and if so, where did you have this conversation, and when?

A. I talked with Mr. George Webber a few moments at the head of the stairway of the Referee's office, about the language of that assignment.

Q. What was said between you and him in regard to it?

Counsel for the Intervenors enter an objection on the ground that it is immaterial, and not binding on anybody, and not competent to prove or disprove any question in this matter. This objection was by the Referee overruled.

A. I told Mr. Webber that Mr. Newton, in reading that assignment while he was on the stand, still contended that it did not represent the notes and accounts to be exclusively the proceeds of goods sold by his firm, bought from Swofford Bros., and I stated that the assignment was susceptible of two constructions. He stated, Yes, I know it, and I wrote it in that way on purpose, and that was everything he said in the conversation.

173 On Cross Examination, witness testified:

Q. Referring to the conversation had with Mr. George Webber, I will ask you if you did not have quite a long conversation at the time to which you refer?

A. No sir. It did not cover more than three or four minutes time.

Q. You were called from that conversation hurriedly into the room in which the case was being tried, were you not?

A. Yes sir.

Q. When you stated to Mr. Webber that Mr. Newton, as a witness on the stand, had stated that he did not understand the assignment to say that the notes and accounts were exclusively the proceeds of the sale of Swofford Bros. goods, you say you mentioned that you thought it was susceptible of two constructions, did not Mr. George Webber then say that he did not see how it could be susceptible to two constructions?

A. I have no recollection as to his replying in that way.

Q. Did he not tell you that it was intended to express the views of Swofford Bros. Dry Goods Co., which are contained in it, and was not his remark directed to that feature of the conversation?

A. He made no other reply in reference to that matter at all that I know of. We did talk about another matter, as he

was going down stairs, but that was on a matter concerning Newton's testimony.

Q. Now, at the time you had the conversation with Mr. Krause, how long was it after Newton & Co. had gone into bankruptcy?

A. That was before they went into bankruptcy. It was in the morning of that day in the store.

Q. On the day he went into bankruptcy?

A. On the morning of the same day, July 3rd.

Q. These notes and accounts had then been turned over to Swofford Bros., had they not?

A. Yes, he said they had, and Newton said they had.

Leo Krause, being recalled, testified for the Inter-
174 venors, as follows:

Q. You have heard Mr. Searcy's statement as to the conversation which he says he had with you with reference to the notes and accounts, please state what occurred in this conversation?

A. The only conversation I remember having had with Mr. Searcy was in a sort of general way, in which we both discussed the legal phrase of the case. I don't remember just when this conversation took place, but I am of the opinion that it was several days afterward, and it seems to me that I first asked him what he thought about it, and he replied "I really don't know. What did your lawyers think about it?" I believe I told him, "It seems to be sort of horse and horse. Judge Scott and Mr. L. Head both declared that the case would be won, but Mr. George Webber is not so enthusiastic over the case, and doesn't think so much of it. What do you think?" He replied, "I don't know. I expect maybe you can win it," and that is about all of the conversation I know of. We have talked in that same channel three or four times since the filing of these papers. Mr. Searcy told that I stated to him that I did not think much of it, and very likely I did say so. I don't remember positively that I did, and I cannot say positively that I did not.

Q. In that conversation were you undertaking to go into details as to the nature of what made up these notes and accounts?

A. We did not, because neither of us knew anything about them.

Q. At that time, Mr. Krause, what authority did you have in this matter of Newton & Co.'s indebtedness to Swofford Bros.?

A. Absolutely none, except to carry out such instructions as Mr. Moore would give me in regard to the stock of goods.

Q. Did any of this conversation, to which Mr. Searcy refers, occur after the time Mr. Moore left here, and before Mr. Ellis arrive, while you were in charge of the stock of goods?

175 A. I don't remember positively when this conversation took place, but I do know positively that I did not have any conversation along that line, or in any other line, with Mr. Searcy until after these goods had been delivered to us, and the notes and accounts transferred.

Q. Mr. Searcy puts the date of the conversation, as I recall, on Monday, July 3rd, the date on which the bankruptcy papers were prepared. State if Mr. Ellis did not arrive here at seven or eight o'clock on Monday morning, July 3rd?

A. I don't know. Very likely he did, but as July 3rd is a date later than the date on which these notes and accounts were turned over to Swofford Bros., and as my recollection of the date is not very good, very likely Mr. Searcy's statement about July 3rd is correct. I don't know.

Q. When Mr. Moore left here, he stated that he left the goods in your charge, what authority, if any, did you have, any other than that of mere custodian of the goods?

A. None whatever.

Q. When Mr. Ellis arrived, state what authority you then had in connection with the matter, from that time on?

A. None at all. I turned the goods, and I believe the keys, over to Mr. Ellis. In fact, I happened to butt-in at a conversation, and Mr. Ellis almost insulted me, and told me to keep out, that he had charge of the case. I had no authority whatever.

The Referee is requested respectfully, in considering the testimony, to look at the ledger, as well as the collection register, of E. M. Newton & Co. in making up his opinion, as to the facts which refer to the Petition in Bankruptcy, and to the Schedules and papers thereto attached.

176 "Exhibit A."

List of Notes Transferred by E. M. Newton & Co. to Swofford Bros. Dry Goods Co.

Date.	Name.	Amount.	Due.
3-15-05	Thos. Wells, Savannah, La.....	$ 75.10	4-15-05
3-15-05	Thos. Wells, Savannah, Tex.....	75.00	5-15-05

3-15-05	Thos. Wells, Savannah, Tex....	75.00	6-15-05
3-15-05	Thos. Wells, Savannah, Tex....	75.00	7-15-05
2-18-05	H. O. Evans, Maude, Tex.....	167.36	2 mo
2-18-05	H. O. Evans, Maude, Tex.....	167.36	4 mo
6- 1-05	L. C. Ray, Maude, Tex.....	48.92	8-15-05
6- 1-05	L. C. Ray, Maude, Tex.....	48.92	9-15-05
6-15-05	L. C. Ray, Maude, Tex.....	48.92	10- 1-05
5-27-05	D. B. Young, Woodlawn, Ark...	155.48	8- 1-05
5-27-05	D. B. Young, Woodlawn, Ark...	155.48	9- 1-05
5-27-05	D. B. Young, Woodlawn, Ark...	155.48	10- 1-05
11-29-04	Mary E. Sullivan, New Lewisville, Ark.	20.00	2- 1-05
12-12-04	M. E. Sullivan, Goldona, Ark...	10.24	1-15-05
1- 9-05	W. W. Strocner, Leasburg, Tex..	45.27	4- 9-05
1- 9-05	W. W. Strocner,.....	45.27	5- 9 05
1 9-05	W. W. Strocner, ...	45.27	2- 9-05
5-25-05	S. S. Williams, Majoir, Tex.....	30.60	2 mo
5-25-05	P. M. McLeighn, Lawinsville, Tex	27.20	2 mo
3- 1-05	J. L. Nix	40.00	4 mo
5-25-05	C. C. Howe, Welch, Ark.....	40.45	2 mo
3-24-05	H. A. McGee, Lewisville, Ark..	50.00	7- 1-05
1- 5-05	G. A. Gannin, Lewisville, Ark....57.30		4- 1-05
11-29-04	M. E. Sullivan, ...	25.00	2-20-05

Received from Swofford Bros. Dry Goods Co. the notes listed above to be held and sold under the terms of an agreement entered into and being dated July 4th, 1905.

T. A. BRYANT,
Receiver.

177 "Exhibit B."

Aug. 29, 1905. E. M. Newton & Co., New Lewisville, Ark., in account with Swofford Bros Dry Goods Co., Kansas City, Mo.:

July	21	To Mdse.	$1476.66
July	21	To Mdse.	2807.02
July	21	To Mdse.	714.08
July	22	To Mdse.	20.00
Aug.	10	To Mdse.	18.00
Aug.	17	To Mdse.	34.96
Aug.	17	To Mdse.	13.95
Aug.	25	To Mdse.	3.50
Sept.	10	To Mdse.	186.00
Sept.	12	To Mdse.	96.00
Sept.	12	To Mdse.	77.50

Oct.	6	To	Mdse.	295.23
Oct.	6	To	Mdse.	12.50
Oct.	13	To	Mdse.	151.83
Oct.	13	To	Mdse.	19.50
Oct.	14	To	Mdse.	215.97
Oct.	24	To	Mdse.	270.52
Oct.	24	To	Mdse.	6.00
Oct.	24	To	Mdse.	37.50
Oct.	29	To	Mdse.	5.50
Nov.	4	To	Mdse.	180.25
Nov.	4	To	Mdse.	104.08
Nov.	10	To	Mdse.	145.10
Nov.	10	To	Mdse.	15.25
Nov.	10	To	Mdse.	46.60
Nov.	14	To	Mdse.	11.25
Nov.	22	To	Mdse.	363.00
Nov.	30	To	Mdse.	505.00
Dec.	5	To	Mdse.	42.28
Dec.	7	To	Mdse.	380.20
1905.				
Feb.	20	To	Mdse.	206.28
Feb.	23	To	Mdse.	254.25
Feb.	25	To	Mdse.	169.60
Feb.	25	To	Mdse.	10.00
Feb.	25	To	Mdse.	1.75
Feb.	25	To	Mdse.	7.75
Feb.	27	To	Mdse.	3851.83
Feb.	27	To	Mdse.	1922.99
Mch.	18	To	Mdse.	68.63
Mch.	20	To	Mdse.	251.28
Mch.	20	To	Mdse.	9.00
Apr.	13	To	Mdse.	8.80
Apr.	27	To	Mdse.	297.18
Apr.	27	To	Mdse.	75.00
				$15389.57

Exhibit C.

178 Statement made this the 1st day of Feby., 1904, to Swofford Bros Dry Goods Co., Kansas City, Mo., by E. M. Newton of the firm of E. M. Newton & Co.; town, New Lewisville; county, Lafayette; state, Ark.

Give Full Name of Each Partner: Name, E. M. Newton; age ..... Married? Yes. Name J. F. Newton; age ....., Married? Widower. Name ..... age .....

Married? .....

—Assets—	Dollars Cts.
Cash value of merchandise on hand.....	$19636 00
Cash value of merchandise in transit	$..... ..
Amount of accounts undoubtedly good	$ 6648 00
Amount of notes undoubtedly good	$..... ..
Cash on hand and in bank	$..... ..
Store building in (town).....(county)..... (state)..... In name of.....	
Cash value, $.... Encumbered for $....Net worth, $..... ..	
Residence in (town).....(county)..... (state)..... In name of.....	
Cash value, $.... Encumbered for $....Net worth, $..... ..	
.....acres of land in (county)..... (state)..... In name of.....	
Cash value, $.... Encumbered for $....Net worth, $..... ..	
Other Real Estate, consisting of..... in (Co.) ..... (state).....in name of.....	
Cash value, $.... Encumbered for $....Net worth, $..... ..	
Cash value of other personal property....	$..... ..
Consisting of	
Total Assets	$26284 00

—Liabilities	Dollars Cts.
For Mdse. on open account not due.....	$..... ..
For Mdse. on open account past due.....	$11163 00
For Mdse. closed by note not due.....	$ none
For Mdse. closed by note past due.....	$ none
For borrowed money secured except on real estate	$ none
Borrowed from whom	
How secured	
When due	
For borrowed money not secured	$ none
Borrowed from whom	
When due	
For chattel mortgage or lien on stock of Merchandisevbgkqj	
For chattel mortgage or lien on..... stock of Merchandise	$ none
In whose favor	
When due	
For chattel mortgage or lien on..... other personal property	$ none

On what .....
In whose favor .....
When due .....
For judgments .....$ none
All other liabilities not stated above.....$ none

Total liabilities $11163 00

Are you (or any member of the firm) indebted to or under obligations to any one, confidentially or otherwise, not mentioned above? No. Former location and occupation?..... How long in this business?..... Is any one interested in the profits of your business except yourself, or your partners whose names are given above? No. Have you, or any of your partners any debts, confidential or otherwise, not included in above liabilities? No. Ever failed in business? ..... If so, when and where? ..... Are you surety or endorser on notes or bonds? No. If so, for what amount? $.... Amount of annual sales? $52000.00. What part on credit? large. What bank do you do business with and where located? Merchants & Farmers Bank. Stock of goods insured for $12,000.00. Store building insured for $.....

References: .....
.....
.....

Give below a full list of your creditors and their addresses.

State the amount you owe each and when due.

Names.	Amounts.	When Due.
Swofford Bros. Dry Goods Co.....	$5356.35	.....
Rosenthal Sloan Millinery Co.....	$2200.00	.....
Turner Bros. and others.....	$1100.00	.....
.....		
.....		

The above is showing by inventory of Jan. 1st, 1904. Since then have borrowed from our bank $2,000.00 payable Oct. 15th, 1904.

The foregoing is a full and true statement giving all our liabilities, confidential debts, firm debts and debts of individual members, and is made to obtain credit with Swofford Bros. Dry Goods Co. for present and future purchases. Should there be any material change in our affairs we expressly

agree to notify Swofford Bros. Dry Goods Co. promptly. It is expressly understood that in granting credit on purchase, renewals, or extensions now or hereafter, Swofford Bros. Dry Goods Co. rely upon the truth of this statement, and if purchaser at any time make mortgage, sale, removal, assignment, or closing-out sale, or if there be suit or levy of process against purchaser or against any member of firm, or if there be dissolution of firm, or death of any member thereof, or loss by fire or otherwise, then Swofford Bros. Dry Goods Co. may, as they shall elect, reclaim all or any portion of the goods theretofore sold or shipped to the undersigned, or may declare indebtedness then owing past due and have the same rights and remedies in every way as though such indebtedness had resulted under contract for payment in cash on delivery.

Sign here full name of firm: E. M. Newton & Co.

By whom signed E. M. Newton a member of the firm.

Exhibit D.

179 E. M. Newton & Co., Texarkana, Ark., and 1017 Washington Ave., St. Louis, Mo.

Salesmen must not use these

Lot No.	Quantity	Terms	Price.	Columns.
400	4 Doz. Susp.	@	.90	3.60
2903	4 Doz. Susp.	@	1.75	7.00
956	2 Doz. Susp.	@	2.00	4.00
33	70 Pc. Baby Ribbon	@	.37½	26.25
33	56 Pc. Baby Ribbon	@	.37½	21.00
1	18 Doz. Towels	@	.80	14.40
a1240	12 Doz. Towels	@	.40	4.80
10	20 Doz. Towels	@	.80	16.00
632	3 Doz. Tablets	@	.40	1.20
4033	22 Doz. Tablets	@	.50	11.00
642	2 Doz. Tablets	@	.80	1.60
	11 Rm. Note Paper	@	.60	6.60
	9 M. Envelopes	@	.75	6.75
1017	2 Doz. Gloves	@	4.50	9.00
	12 Doz. Lace	@	1.25	15.00
	16 Doz. Knee Pants	@	2.25	36.00
	16 Doz. Box Paper	@	.75	12.00
D.N.A	22 Grs. Prl. Buttons	@	.75	16.50
	16 Doz. Prl. Buttons	@	.60	9.60

293	10	Gro.	Buttons ..... @	.65	6.50
660	11	Gro.	Buttons ..... @	.50	5.50
20	6	Gro.	Buttons ..... @	.45	2.70
060	8	Gro.	Buttons ..... @	.50	4.00
031	45	Doz.	Buttons ..... @	.45	20.25
1248	4	Doz.	Purses ..... @	2.25	9.00
1466	4	Doz.	Purses ..... @	2.25	9.00
101	1	Doz.	Purses ..... @		2.25
1251	4	Doz.	Purses ..... @	3.50	14.00
1307	5	Doz.	Purses ..... @	2.25	11.25
1262	3½	Doz.	Purses ..... @	3.50	12.25
1255	6	Doz.	Purses ..... @	2.25	13.50
1251	5	Doz.	Purses ..... @	2.25	11.25
	100	Gros.	Prl. Buttons ..... @	.25	25.00
330	1	Doz.	Gloves ..... @	4.50	4.50
					373.25

I find upon investigation that it is impossible to identify all of the goods that were furnished us by other creditors which were included in the lot of goods turned over to W. N. Moore for Swofford Bros. for the reason that many of them have no stock numbers on invoice, such as neckwear, jewelry and a good many other items which were turned over to them that were not shipped to us by them.

181-182

Atlanta, Ga., Oct. 12, 1904, E. M. Newton & Co., New Lewisville, Ark. Bought of Montag Bros., Manufacturing Stationers.

67 Doz. Tablets	652	$ .27 3-5	$18.49
84 Doz. Tablets	2280	.26 2-5	22.18
42 Doz. Tablets	2510	.28 4-5	12.10
20 Doz. Tablets	2581	.28 4-5	5.76
10 Doz. Tablets	4032	.40	4.80
17 Doz. Tablets	632	.27 3-5	4.67
22 Doz. Tablets	2581	.28 4-5	6.33
32 Doz. Tablets	4032	.48	15.36
			$26.36

Back order complete.

183-183a

St. Louis, 11-30, 1904. E. M. Newton, Lewisville, Ark.

Bought of L. Herzog Bro. Dry Goods Co.

3508 25 Doz. Knee Pants .....@ 2.25 56.25 56.25

Buffalo, N. Y., Nov. 22, '04. Buffalo Glove & Whip Manufactory. Sold to Messrs. E. M. Newton & Co., Lewisville, Ark.
5 Doz. No. 330 Gloves .....@ 4.25 $21.25

U. S. Express.

184

Mansfield, O., April 15, '04. The Ohio Suspender Co. Sold to E. M. Newton & Co. New Lewisville, Ark.

Suspenders.	No.	Doz.			
	20903	10	@	1.75	17.50
	121	20	@	1.12½	22.50
	125	20	@	1.12½	22.50
	G 131	20	@	1.25	25.00
	G 134	20	@	1.25	25.00
					$112.50

No returned goods will be accounted under any consideration without a previous arrangement by correspondence.

185

New York, July 8, 1904. Messrs. E. M. Newton & Co., New Lewisville, Ark. Bought of Appelbee & Neuman, Mfrs. of Pearl Buttons.

5 Gross each 060 14 16 18.....			
5 Gross each 060 20 22 24.....35		10.50	OK
5 Gross each 031-14 16 18.....			
5 Gross each 031 20 22 24 25		7.50	CK
12 Doz. 780-24 less 5 per cent trade.....60		6.85	BTK
5 Gross 020-36 2		10.00	OK
10 Gross 203-02 55		5.50	SE
21 Gross Job fish eye 45		9.45	OK
10 Gross 203-16 70		7.00	BTK
12 Gross 068-12 55		6.60	SE
		63.40	

Express.

186

New York, Oct. 22, 1904. Messrs. E. M. Newton & Co., New Lewisville, Ark. Bought of Appelbee & Neuman, Mfrs. of Pearl Buttons.

5 Gross each 060 14 16 18		
5 Gross each 060 20 22 24	.35	10.50
5 Gross each 031-14		
5 Gross each 031-16		
5 Gross each 031-18		
5 Gross each 031-20		
5 Gross each 031-22	.25	6.25
10 Gross each 203-14	.55	5.50
10 Gross each 203-16	.70	7.00
1 Gross each Job D. N. A		.36
1 Gross Star Seef Shank 45		1.80
1 Gross Ocean 4-hole		.30
		$31.71

187

New York, Nov. 5, 1904. Messrs. E. M. Newton & Co., Lewisville, Ark. Bought of Appelbee & Neuman, Mfrs. of Pearl Buttons.

44 Gross Job D. N. A	.36	15.84
10 Gross Star S. S. 45	1.80	18.00
50 Gross 031-14 to 22	.25	12.50
		46.34

Express.

188-189

St. Louis, Mo., Feb. 10, 1904. H. Seligman & Co. Sold to E. M. Newton & Co., New Lewisville, Ark.

1612 ½ Gr. Bags	.27	13.50
1437 ½	.27	13.50
1602 ½ 1600-1	.27	13.50
1620 ¾ Doz 1653	4.50	3.38
1616 1 1728		4.50
1421 ½	3.75	1.88
1657 ¾ 7205	4.50	3.37
1614 ½ Gr.	.27	13.50
1641 ¼ Doz.	.12	3.00
1640 ½ 1715	09	4.50
7211 ¾ 1709-1736	.12	9.00

1474 1		2.13
1453 1 1452		2.25
1466 ½ Gr.	.15	7.50
14 1 Doz. Belts		2.12
71 1-3	10.50	3.50
83 ½ 72	7.50	3.75
80 1-6	7.50	1.25
60 ½	4.00	2.00
61 1 102, 2 short		4.25
57 2-3 98	4.50	3.00
1590 3 2	2.12½	4.25
4851 3 7-12 (all) 7 short	1.50	.88
4840-1 4 7-12	1.75	8.02
4863 2	2.25	4.50
7626 ½ Neckwear	2.25	1.12
7628 ½	3.75	1.88
7624 ½	2.12	1.06
7604 1 7612-11		2.25
7737 1 7735		2.25
1894 1 Gr. Combs		9.00
2323 3 Doz Rod Pins	.85	2.55
1324 1		1.25
2355 1 Doz Combs		2.00
3442 ½ Gr. Links	18.00	9.00
Asst 1		15.00
6113 1-3 Doz Stock Pins	2.00	.67
6153 1 6148-9		1.50
6157-8 1		1.25
6235 I W. Sets		2.00
6415-03 1 6346		2.00
6207 1 6414		2.00
2594-5 1 Gr. Pins		.75
1216 1 Purses		4.50
1203 5 Doz. Purses	.50	2.50
1204 11 7-12	4.00	3.98
1307 6½ P. B. (all)	1.50	9.50
1303 4 1251	16.22	6.50
6245 1 W. Sets Asst.		1.25
7760 1-6 Stocks		.25
		$219.54

190-191-192

Memphis, Tenn., 5-17, 1905. The Wm. R. Moore Dry Goods Company. Sold to E. M. Newton & Co., New Lewisville, Ark.

3922	30	Elastic	.25	7.50
2118	9M	Envelopes	.75	6.75
2905	1M	Envelope		.75
864	20	Gro. Saf. Pin	.15	3.00
865	20	Gro. Saf. Pin	.20	4.00
866	30	Gro. Saf. Pin	.25	5.00
2007	2	Gro. Hoox & Eye	.75	1.50
13682	8	5-12 Doz. Thimbles	.10	.85
3069	10	Garter	.40	4.00
4749	5	Susp.	1.20	6.00
3140	5	Susps.	.75	3.75
1107	5	Susps.	.75	3.75
246	25	G. Hand	.37½	9.38
2312	20	Hand	.37½	7.50
2039	5	Brush	.40	2.00
890	5	Purse	.40	2.00
				$67.73
2176	5	Gt. Gro. Buttons	.45	2.25
2175	5	Gt. Gro. Button	.45	2.25
2699	5	Doz. Shears	.40	2.90
2037	25	L. Hose	.75	18.75
3629	50	H. Hose	.75	37.50
				$62.75
23	5	Doz. Jumpers cxxo	4.50	22.50
8	10	Overall axxo	4.50	45.00
				$67.50

193 In the United States District Court for the Texarkana Division of the Western District of Arkansas.

No. 145.

In R E. M. Newton & Co., Bankrupts.

Intervention of Swofford Bros. Dry Goods Co. for merchandise original cost ..... $ 5337.21

Notes, face value 1684.32

And accounts face value 8277.04

Total face value $15298.57

or the proceeds of the same, in the hands of the Trustee in Bankruptcy of this estate.

SEVIER, Special Master.

Voluntary petition (Exhibit 1) was filed by E. M. Newton & Co. on July 3, 1905, 5:30 P. M., and adjudicated in bankruptcy made same day.

The Intervention (Exhibit 2) filed by Swofford Bros. Dry Goods Co. of Kansas City, Mo., August 10, 1905, 9 A. M.

Answer (Exhibit 3) of the trustee to the Intervention of Swofford Bros. Dry Goods Co., filed August 16, 1905, 2 P. M.

Amendment (Exhibit 4) to answer of the Trustee, filed August 29, 1905 at 10 A. M.

Reply (Exhibit 5) of Swofford Bros. Dry Goods Co., filed August 30, 1905 10 A. M.

Amended and substituted answer (Exhibit 6) of the trustee filed September 1, 1905 10 A. M.

Motion to strike (Exhibit 7) and reply (Exhibit 8) of Swofford Bros. Dry Goods Co., filed September 5, 1905; Motion overruled.

Investigation of the matter was held before at Referee, as Special Master, on August 30th and 31st and September 1, 1905 at his office in Texarkana, Ark. The issue in controversy is the title to the marchandise, notes and accounts of E. M. Newton & Co., claimed by Swofford Bros. Dry Goods Co., in the Intervention filed herein, marked Exhibit No. 2 or the proceeds thereof, now in the possession of the Trustee of this estate.

The evidence shows that E. M. Newton & Co., had been merchandising ten or twelve years in Lewisville, Arkansas; that on July 20, 1904, they entered into a written contract (a copy of which is attached to the intervention filed herein) with Swofford Bros. Dry Goods Co., of Kansas City, Mo., for the purpose of obtaining merchandise from said Swofford Bros. Dry Goods Co.; that during the continuance of this contract, E. M. Newton & Co. bought from Swofford Bros. Dry Goods Co. merchandise to the amount of $15396.57, upon which they had paid $2059.56, leaving the balance due to Swofford Bros. Dry Goods Co. $13310.56; that this said
194 contract was terminated by Swofford Bros. Dry Goods Co. on June 30, 1905, at which time, E. M. Newton & Co. delivered to the agent (Moore of Swofford Bros. Dry Goods Co., the merchandise, notes and accounts, now here in controversy, as being the property of Swofford Bros. Dry Goods Co., remaining in their hands, that three days later,

on July 3, 1905 E. M. Newton & Co., filed their voluntary petition in Bankruptcy, and were adjudged bankrupts on the same day; that on the next day, July 4, 1905 the Receiver appointed by the Referee, in this estate, entered into a written agreement with Mr. Ellis, Attorney of Swofford Bros. Dry Goods Co. (a copy of which agreement is attached to the Intervention filed herein) by and under which the said merchandise, notes and accounts, now here in controversy, were turned over by Swofford Bros. Dry Goods Co., by its Attorney (Ellis) to the receiver of this bankrupt estate, who by the order of the referee, sold the said merchandise at public sale for $3135.00, and who is now collecting the said notes and accounts, separately, subject to this litigation.

The evidence shows that the contract of June 30, 1905, between Swofford Bros. Dry Goods Co., and E. M. Newton & Co., was made in the office of Swofford Bros. in Kansas City, Mo., by Mr. Moore (Credit man of Swofford Bros.) and Mr. W. M. Newton, no one else being present; the testimony as to any agreement as to recording the contract or its publicity is conflicting. Mr. Newton, testified that it was understood and agreed that the contract was to be kept secret, as its publication would naturally hurt the business of his firm, and Mr. Moore testified to the contrary of any such understanding. Mr. John Newton a partner, Mr. Fay Searcy, the bookkeeper and Mr. Weatherby, a traveling salesman of E. M. Newton & Co. all testifying that they had no knowledge, nor any information, in regard to this contract, and having never heard of it until after the bankruptcy proceedings were instituted. The schedule of liabilities filed by the bankrupts show about 35 unsecured creditors, to whom they were owing about $16000.00, when the petition was filed, beside the debt of $13310.00 due Intervenor.

There, was due to Merchants and Planters Bank at Lewisville, Ark., unsecured, about $3500 which is uncluded in the above.

The evidence shows that there was not any record kept by E. M. Newton & Co. of the proceeds of the sales of stock which was represented by the open accounts and notes, with regard as to whether they were for goods sold for Swofford Bros., or any one else, and there is no testimony that Swofford Bros. ever required from Newton & Co., any report of sales, or that any such report was ever made. The evidence shows, that E. M. Newton & Co. mixed the goods purchased from Swofford

Bros with goods purchased from other creditors and sold them indiscriminately, regardless of from whom they were purchased.

195 On June 30, 1905, when the goods, notes and accounts were turned over to Mr. Moore, agent of Swofford Bros., Mr. Moore testified that he did not know and had no reasonable cause to believe E. M. Newton & Co. insolvent, but he qualified the assertion by saying that he paid no attention to that feature of the case, as he had made up his mind to terminate the contract as soon as E. M. Newton confessed to him that he had falsely represented to him his financial condition, during the entire transaction between them, and that while he had come to Texarkana with the purpose of aiding Mr. Newton financially and of helping him to bridge over his troubles, if conditions were such as Mr. Newton represented them to be; but that as soon as he had heard Mr. Nweton's confession, he at once decided to close the contract and bring matters to an end. Mr. E. M. Newton testified that in turning over the accounts to Mr. Moore on June 30, 1905, for Swofford Bros. that he had designedly and purposely selected the best accounts on his ledger regardless of whose goods they represented; and in a general way throughout the whole transfer of this property to Mr. Moore, that he had intentionally favored Swofford Bros. with a view of obtaining some advantage from Swofford Bros. later on. Mr. Moore and Mr. Leo Krause, both deny any knowlelge of any such preference, and testify that they told Mr. Newton, repeatedly, that they wanted only such goods as had come from Swofford Bros. or notes and accounts that represented such. It is in proof that E. M. Newton repeatedly asked Mr. Moore, direct or through others for money.

The evidence shows that Mr. Ellis, Attorney for Swofford Bros. Dry Goods Co., participated in the preparation of the petition in Bankruptcy and the schedules therein, of the bankrupts and suggested and is responsible for the account of Swofford Bros. Dry Goods Co., being listed therein with the statement attached thereto, in reference to the merchandise, notes and accounts turned over to Mr. Moore, the agent of Swofford Bros. on June 30, 1905, after the bankrupts, under the advice of their attorney Mr. Searcy, had decided not to include the account of Swofford Bros. Dry Goods Co. in the schedule of their liabilities, as they considered it as haying been paid and settled.

The statement referred to attached to Swofford Bros. Dry Goods Co., account was dictated by Mr. Ellis, attorney for Swofford Bros. and type written by Mr. Geo. Webber, with the schedule of the liabilities and the petition was signed and sworn to by the bandrupt as they testified, without their knowledge or having been informed that this statement was contained therein, or having been read by them. Both sides were earnestly represented by able counsel as will be apparent by an examination of this evidence, which is exhaustive and thorough completely covering and explaining every possible issue between the parties.

196 One of the chief points of interest was whether or not E. M. Newton & Company intended to attach to their petition in bankruptcy the statement that the notes and accounts turned over by them to Swofford Bros., represented merchandise only which Swofford Bros. had sold them under the contract of June 30, 1904, and the testimony on this question will appear conflicting and unsatisfactory and to a large extent personal.

On the question of the validity of the contract of June 30, 1904 between Swofford Bros. and E. M. Newton & Co., the attached briefs were filed as exhibits, by counsel, as exhibits 9 and 10 which have received careful consideration from the Special Master.

After a very considerable research pro and con, through a very extensive field of decisions on conditional sales and consignments, including the authorities presented by counsel on both sides of this controversy, the Special Master had about concluded that the opinion delivered by Circuit Judge Jenkins of the 7, C. C. A. in Re Antigo Screen Door Co. 10 A. B. R.—359, would seem to apply and decide the case at bar, being in many respects very similar, and being under the Wisconsin Law, which like the Arkansas Law declares "a mortgage void where the mortgagee remains in possession and is given the right to make sales of the mortgaged property for his own use and benefit." 50 Ark. 97-44 Arkansas 310-46 Arkansas 122.

Judge Jenkins, in his decision, declares that "where under the State Law, a chattel mortgage, giving the right to the mortgagee to make the sales from the mortgaged property for his own uses and benefit" is thereby rendered fraudulent in fact, the fact that the mortgagee takes possession of the property does not validate it in a contest with the trustee in

bankruptcy of the mortgagee in behalf of general creditors." The State Law governs 196 U. S. 516-13 A. B. R.-437. In both the Antigo Screen Door case (quoted above) and in the case at bar, the contract was made more than four months prior to the filing of the petition in bankruptcy; in both cases, the property was turned over under the contract to the Vendor by the Vendee only a few days before the petition in bankruptcy was filed; in both cases the property was delivered by the Vendor to the bankruptcy court, to be sold by the court, with the agreement that the proceeds were to be held until the respective rights of the parties to the fund were to be determined by the court; and in both cases the State law, which would seem to govern in such matters, was identical.

This decision of the 7, C. C. A. would seem to be conclusive that the contract at bar was void.

197 On the other hand, the tendency of Judicial interpretation and opinion of the Bankruptcy Act seems to be to crystalize around the construction, that it is essentially an equity law and should be so administered by the courts; and to accept the doctrine that equity, in its broadest sense, but in a reasonable spirit should hold in check the constant danger of degenerating into technicality, and in following precedent too closely, of placing form above substance, (178 U. S. 524) Bardes vs. BK-4 A. B. R. 163, Rochford 10 A. B. R. 608. From this Equity point of view, this said contract of July 30, 1905 between Swofford Bros. Dry Goods Co. and E. M. Newton & Co. would, without doubt, come under and be controlled by the recent decision of the Honorable U. S. District Judge of this District in re Cox Wholesale Grocery Co. vs. the Trustee of the Hendricks Estate, wherein he sustained the validity of the contract. In both the Cox Case and in the case at bar, there were written contracts, both unrecorded, with reservation of title by the Vendor in all the goods bought from the Vendor unsold, in the possession or under the control of the Vendee, who had the right to sell the goods in the usual course of business and to pay the Vendor a fixed price.

In the Cox case, the bankrupt turned the goods over to the Trustee after the petition in bankruptcy was filed. In the case at bar the bankrupt turned the goods over to the Vendor three days before the petition was filed; and as the Vendor testified, without its knowledge of the Insolvency of the Vendee, but shortly after the confession of the Vendee that E.

M. Newton & Co. had deliberately and continuously misrepresented their financial condition to the Intervenor so as to induce it (Swofford Bros. Dry Goods Co.) to sell them goods. In the face of this confession of the misrepresentation on the part of the Bankrupt, Equity would seem certainly intervene and permit Swofford Bros. Dry Goods Co. to retain the goods, in Re Hamilton 9 A. B. R. 65.

The next proposition, under the circumstances as detailed in the evidence, is what merchandise, notes and accounts in this case shall the Intervenor be allowed to reclaim. The law gives him, only such merchandise as he sold to the bankrupt, or the notes and accounts representing the proceeds of such goods as could be identified as having been purchased from the intervenor by E. M. Newton & Co. Under this construction of the law, it may be safe to say, that the Intervenor would take all the merchandise turned over to it by E. M. Newton & Co., also all the notes (47 Arks., 533-53 Arks. 545 on the confusion of goods) as it would seem to be a physical impossibility to segregate the several items, if there be several
that constitute the amount of the notes.

198 Now as to the accounts, E. M. Newton testified that with much labor and time, the identical goods might be traced that had been sold to each customer, and the original Vendor identified; but it was his opinion, that about 50c of all the accounts represented merchandise that had been bought from the Intervenor. Under all the circumstances, therefore it might be right and proper to divide the proceeds of all the accounts between the Intervenor and the Trustee, after the trustee, collecting what he can and selling the balance of the accounts at public sale to the highest bidder, at which sale the Intervenor would be permitted to bid.

In regard to the admission of the trustee in this agreement of July 4, 1905, with Mr. Ellis, Attorney for the Intervenor, that the merchandise, notes and accounts turned over to Swofford Bros. Dry Goods Co., on June 30, 1905 by E. M. Newton & Co., the bandrupts, represented goods which had been purchased by E. M. Newton & Co. from Swofford Bros. Dry Goods Co., it might be proper here to metion that the Referee stated, in the evidence filed herewith, that he had approved this admission of the Trustee because he relied impliciry upon the sworn statement of the bankrupts, attached to their schedule A, of their liabilities in their petition in bankruptcy, that such was the fact. At the time this agreement was executed, July 4, 1905, there was no question nor

intimation that the sworn statement of the bankrupt was not true.

From the law and the evidence, as detailed by the Special Master, he is of the opinion that the Intervenor should reclaim and take the merchandise and notes in controversy at bar and one-half of the proceeds of all of the accounts of this bankrupt estate, filing the balance of his account as an unsecured claim against the estate and pay half of the costs of this investigation; and the Special Master would most respectfully so report.

A. H. SEVIER,
Special Master.

Report of Special Master. 9-16-05. Filed, Sept. 15, 1905.

John M. Somervell, Clerk.

199 In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the matter of Intervention of Swofford Bros. Dry Goods Company,

Filed in the Bankruptcy Proceedings Aagainst E. M. Newton & Co.

Exceptions of the Trustee in Bankruptcy of said E. M. Newton & Co. to the findings and report of Hon. A. H. Sevier, Special Master.

Niw comes T. A. Bryant, trustee in bankruptcy for E. M. Newton & Co., and makes the following exceptions to the report of the Hon. A. H. Sevier, as Special Master upon the Intervention filed by Swofford Bros. Dry Goods Co.:

1. The Trustee excepts to the conclusion of the Special Master that the contract of July 20th, 1904, making the sile of merchandise to Newton & Co. conditional, was valid in view of the facts found that all the merchandise sold under said contract shipped to E. M. Newton & Co. was mixed with goods purchased from other wholesale firms, there being no restriction on the manner in which said goods should be sold, no requirement of reports to Swofford Bros. Dry Goods Co., and no separate record kept of either of the goods or the proceeds of sales, but it was understood by both parties that the goods should be sold in the usual course of business without keeping a separate record of the sales thereof or requiring

that the proceeds of sales be reported and turned over to the seller.

2. The master erred in awarding to Swofford Bros. Dry Goods Co. the merchandise which was turned over to Swofford Bros. Dry Goods Co. by Newton & Co. on the 30th day of June, 1905, because said contract of July 20, 1904, was fraudulent as to the creditors of Newton & Co. for the reasons above stated.

3rd. The master erred in setting apart to said Swofford Bros. Dry Goods Co. all of the notes of the firm of Newton & Co., under said contract of July 20th, 1904, because there was no requirement by Swofford Bros. Dry Goods Co. and no effort on the part of Newton & Co. to keep the goods bought of Swofford Bros. Dry Goods Co. separate from the goods purchased from other firms nor to keep the proceeds of sales separate, and for the further reason that there was no distinct evidence showing that any part of said notes represented goods sold by Newton & Co. were acquired from Swofford Bros. Dry Goods Co., no record having been kept showing whether all or any part of said goods had been paid for by the customers of Newton & Co., and it would be impossible to say from the proof whether said notes repre-
200 sented any part of the proceeds of said goods.

4. The master erred in awarding to said Swofford Bros. Dry Goods Co. one-half of the accounts of said firm of Newton & Co. for the same reason stated in Exception No. 3.

5. The Master erred in sustaining said contract of July 20, 1904, because it was fraudulent as to the general creditors of said firm of Newton & Co., who had no knowledge of said contract. Said Newton & Co. were authorized by the Intervenors to hold themselves out to the world as the absolute owners of said goods, Newton & Co. represented themselves to be the owners, they had been giving every indication of ownership and other creditors advanced goods and money to said Newton & Co., upon the faith of said Newton & Co. having bought this merchandise in the usual way. It was understood between the said Intervenors and Newton & Co. that said contract should not be recorded but should be kept secret, because it would injure the business of said Newton & Co. to make it known and by reason of said concealment said Newton & Co. were enabled to obtain large credit from banks and merchants.

6. Said Master erred in failing to find (no finding having

been made either way upon the question) that Swofford Bros. Dry Goods Co., through its agents and attorneys knew at the tim esaid notes and accounts were turned over that no separate record, or account was kept as hereinbefore stated; and also knew or were in possession of facts which would have put a reasonable man upon inquiry which pursued would have led to a knowledge that said Newton & Co. were insolvent at the time the goods, notes and accounts were turned over.

7. The Master erred in holding that Swofford Bros. Dry Goods Co. ought to sustain its intervention herein because of the alleged admissions of E. M. Newton that he had misrepresented the financial condition of Newton & Co., on June 30, 1905, because (a) the proof is insufficient to show that E. M. Newton made this alleged admission; (b) it is not shown what the misrepresentations were, if any, or that they were material, or influenced Swofford Bros. Dry Goods Co., either in making the contract of July 20, 1904, or in shipping the goods thereunder; (c) the proof on this point was merely incidental, and too meager to be considered; (d) the said Swofford Bros. Dry Goods Co. was guilty of laches in not ascertaining their true financial condition within the eleven months succeeding the execution of the contract and before the rights of other creditors had intervened, and (e) because the intervenor did not claim in the pleadings in this case, the right to recover on the ground that the goods were obtained under false representations and no issue was made in reference thereto.

8. The Master erred in holding that the laws of Arkansas govern in this cause as to the validity of said contract of July 20, 1904, when the proof is undisputed that all the goods were sold and delivered to the common carrier in Kansas City, Mo.

201 9. The Master erred in holding that it was the duty of Newton & Co. to keep a separate account of the sales of goods purchased from Swofford Bros. Dry Goods Co. (although there was no agreement to that effect) and that upon their failure to do so that Swofford Bros. Dry Goods Co. could claim all or any part of the general accounts of the firm against the trustee representing the general creditors who knew nothing of said contract.

10. The Trustee further excepts to the report of the Special Master because in finding that Swofford Bros. Dry Goods

Co. was entitled to the proceeds of sale of all the goods, which Newton & Co. turned over to them, failed to reserve from said proceeds of sale the value of certain goods to about $433.00 which Newton & Co. had purchased from other parties than the said Swofford Bros. Dry Goods Co., as shown by the testimony of E. M. Newton, particulars of which will be found in the exhibit attached to E. M. Newton's testimony, and the invoices of goods showing lot numbers, from whom purchased, etc.

Wherefore premises considered, trustee prays that he may have judgment on his said exceptions, and that the findings of the Special Master herein may be reviewed, set aside and held for naught and that upon a final hearing of this cause, that this trustee may be declared to be the owner of all the property mentioned and described in the intervention and for othr relief.

R. L. SEARCY and
W. H. ARNOLD,
Attorneys for Trustee.

Exceptions to findings of Special Master: Filed 9-15-05, 9 A .M., and overruled for reasons stated in the report of the Special Master. A. H. Sevier, Special Master.

202 In the District Court of the United States for the Western District of Arkansas, Texarkana Division.
In the matter of E. M. Newton & Co., Bankrupts,
vs. In Bankruptcy, No. 145.
Swofford Bros. Dry Goods Company, Intervenors.

Now comes Swofford Bros. Dry Goods Company, Intervenor herein, and objects and excepts to the report of the Hon. A. H. Sevier, Special Master, filed in this cause, for the following reasons:

First: For that the Special Master errs in failing to find and hold that the pleadings under which the trustee seeks to maintain a claim against the property in controversy fail to set forth facts snfficient to constitute any claim, cause of action, equity, or ground of relief in favor of said trustee.

Second: For that the Special Master errs in overruling objections of Intervenor to the introduction of any evidence on behalf of the trustee under the pleadings for the reasons and upon the grounds recited in the last foregoing exception.

Third: For that the Special Master errs in holding that

the trustee is entitled to recover in this proceeding without alleging in his answer to intervenor's petition and proving that at the time said bankrupts delivered the property in controversy to intervenor, they were insolvent and that thereby intervenor derived and will derive a preference over other creditors of said bankrupts of the same class.

Fourth: For that the Special Master errs in failing to find and hold that said trustee was bound and estopped by the act of said bankrupts in delivering the said notes and accounts in controversy to intervenor as the proceeds derived from the sale of its goods.

Fifth: For that said Special Master erred in not finding and holding that the acts of the bankrupts in selecting, dedicating and delivering the notes and accounts in controversy to intervenor is binding upon said bankrupts, and that thereby they, and all persons holding under them, including their trustee in bankruptcy, is precluded and estopped from alleging or contending the contrary.

Sixth: For that the said Special Master errs in admitting and considering testimony on the question whether the conditional sale contract in controversy was filed for record, because there is no law in Arkansas either requiring or permitting the same to be filed or recorded, and all testi-
203 mony and evidence pertaining to said subject should be excluded and expunged from the record.

Seventh: For that said Special Master errs in failing to find and hold that intervenor was not in fault or in any way derelict in its duty in omitting to record the conditional sale contract of July 20, 1904, because there is no law in the State of Arkansas either requiring or permitting such contract to be recorded.

Eighth: For that said Special Master has erred in failing to expressly find and hold that the trustee is bound and estopped, under and by virtue of the stipulation entered into between intervenor and the officers of this count under date of July 4, 1905, from denying that the notes and accounts in controversy are the actual proceeds of sales by bankrupts of goods delivered to them by intervenor under the conditional sale of contract of July 20, 1904.

Ninth: For that said Special Master errs in not finding and holding that this court has no authority and purisdiction to vacate and set aside said stipulation without a return to

intervenor of the possession of the property obtained thereby.

Tenth: For that said Special Master errs in failing to find and hold that under the conditional sale contract of July 20, 1904, said bankrupts were not permitted to make sales of the property delivered to them thereunder for their own use and benefit, because the contract referred to, in specific terms provides that the proceeds of all sales of goods delivered thereunder shall be and remain the property of intervenors until the full purchase price of said property is paid by said bankrupts, and because the evidence shows, and said Special Master has found that said bankrupts did, pursuant to the terms of said conditional sale contract, turn over and deliver to said intervenor the notes and accounts in controversy as being the proceeds of sales of intervenors property, and because the stipulation of July 4, 1905, specifically admits that the notes and accounts, so delivered, to intervenor, were in fact the actual proceeds derived from the sale of goods delivered to said bankrupts under the sale of goods delivered by intervenor to said bankrupts under and by virtue of the conditional sale contract of July 20, 1904.

Eleventh: For that said Special Master errs in failing to find that under the pleadings, the stipulation and the evidence, Intervenor is entitled to recover the property in controversy in accordance with the prayer in the petition in intervention filed herein.

Wherefore Intervenor prays that the report of said Special Master may be vacated and held for naught in the particulars above mentioned, and that judgment may be entered in behalf of intervenor in accordance with the prayer of its petition in intervention filed herein.

E. S. ELLIS,
WEBBER & WEBBER,
For Intervenor.

204 In Re E. M. Newton & Co., Bankrupts, Intervention of Swofford Bros. D. G. Co., Exceptions. Filed in my office this Sept. 15, 1905, and overruled for reasons stated in my report as Special Master. A. H. Sevier, Special Master.

205 In Re Newton & Co., Bankrupts.,

In Intervention of Swofford Bros. Dry Goods Co.

Memorandum of Decision.

The intervention of the property of the bankrupts depends

practically on the validity of the contract between intervenors and one of the members of the bankrupt firm, acting for the firm. The delivery of the property to intervenors three days before the bankrupt proceedings were begun, when intervenors had full knowledge of the bankrupt's insolvency, would of course, in the absence of a valid lien of mortgage, be absolutely void, under the provisions of the bankrupt Act, Sec. 60 a and b and Sec. 67 e. A careful reading of the contract must satisfy any reasonable man that it was not intended to make the sales of intervenors to the bankrupts conditional, but that the real intention was to secure them by a lien in the nature of a mortgage. Among other conditions of the contract it is provided, "1... That said first party shall have the right to sell goods in the ordinary course of business, but not otherwise.

"2. Said second party, (Intervenors) shall prepare at the time of shipments full and complete invoices of the goods so sold and selected and shall deliver copies of said invoices by mail or otherwise to said first party. Such invoices shall consist of itemized list of the articles so sold and shipped with the price and value of each article and shall also show the credit terms upon which the same are sold, and the rate of discount, if any, which is to be allowed upon payment of the purchase price in cash, upon delivery or at an earlier date than that specified in said credit terms.

"3. The title to and the right to immediate possession of all the goods so sold and shipped by said Swofford Bros. Dry Goods Co., and of the proceeds derived from the sale of same by first party, whether in cash, note or book-account, shall be vested and remain in said Swofford Bros. Dry Goods Company, until the full purchase price and the agreed value of the same shall be paid by said Newton & Co. to said Swofford Bros. Dry Goods Company in cash, and any and all notes, checks and accepted drafts shall not be considered as payment, but merely as evidence of the indebtedness, and upon taking possession of any notes and book accounts derived by said party from the sale of said goods, or any part thereof, said Dry Goods Company shall have the right to collect the same, etc.

"4. This contract and the terms thereof shall apply to all future orders given by Newton & Co. and to all future sales and shipments to them by said Dry Goods Company, so long as any part or portion of the purchase price of the goods sold

and delivered hereunder shall remain unpaid. Said Dry Goods Company shall have the right to terminate the same at any time and said Newton & Co. may terminate the
206 same at any time by paying in full in cash whatever balance of the purchase price of the goods purchased and shipped shall remain unpaid. Delivery of goods packed and marked to a common carrier at Kansas City, Missouri, consigned to first party, as above specified, shall be deemed and considered a full and complete delivery thereof by said second party, and all freight and transportation charges shall be paid by said consignee. The acceptance of goods subsequently sold and shipped by first party and the placing of the same in their store or warehouse at Lewisville, Arkansas, or elsewhere, shall be held and considered sufficient to bring such goods within and under the terms of this contract, and it shall not be necessary or essential that the fact that goods ordered by first party or sold and shipped by second party are within and under the terms hereof shall be mentioned or referred to in the orders so given, or in the invoices given and delivered with each shipment."

This contract was kept secret, and neither recorded nor made known to any creditors or other person, not even to the other partner or any of the employees of the firm.

That such a contract is nothing but a mortgage is too clear to require any extended argument. That a mortgage or a lien on a stock of merchandise, with possession remaining in the mortgagor and with full authority to sell the same in the usual course of business, without being required to pay over these proceeds to the mortgagee, is a constructive fraud and vitiated the mortgage as against creditors, or the trustee in bankruptcy, who represents the creditors, regardless of the intention of the parties, is well settled, not only under the bankruptcy law, but under the Statute of frauds, which has been re-enacted in this state. Twyne's case, I Smith's Leading cases (7th Am. Ed.) 52; Robinson vs. Elliott, 22 Wall. 513; Means vs. Dowd, 128 U. S., 273; Strahorn-Button-Evans Co. vs. Quigg, 38 C. C. A. 395; 97 Fed. 735. And this is the settled rule adopted in this State in construing this provision of the Statute of frauds. Sparks vs. Mack, 31 Ark. 666; Lund vs. Fletcher, 39 Ark. 335; Fink vs. Ehrman, 44 Ark. 315; Gauss vs. Doyle, 46 Ark. 123.

The instrument being void in a court of law, can of course have no more efficiency in a proceeding in equity, and espe-

cially so in a proceeding in bankruptcy, the main object of the Act being to secure an equal distribution of the assets of the bankrupt among all creditors.

It may be well to quote from what is said in Robinson vs. Elliott:

Manifestly it (meaning the instrument) was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods and
207 enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and this ownership and possession has existed without interruption for ten years. There was nothing to put creditors on their guard; on the contrary, this long continued possession and apparent ownership were well calculated to create confidence and disarm suspicion.

* * * In fact, the mortgage, if it can be called so, is but an expression of confidence, for there can be no real security where there is no real lien. Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own and appropriate the proceeds to their own purposes, and this, too, for an indefinite length of time. A mortgage, which, in its terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward of other creditors, and where the instrument on its face shows that the legal effect of it is to delay creditors the law imputes to it a fraudulent purpose," 22 Wall, 525.

That such an instrument is void as against a trustee in bankruptcy has been expressly held by the U. S. Circuit Court of Appeals for this Circuit in In Re Pekin Plow Co. 50, C. C. A. 257, 112 Fed. 308.

The failure to record the mortgage, as required by the laws of this State, vitiates it as against the trustee in bankruptcy, Sect. 60 of the Bankrupt Act as amended by Act of 1903.

The order of the Referee is set aside and judgment will be entered dismissing the intervention at the cost of the Intervenors.

No. 145. In Re E. M. Newton & Co., on Intervention of

Swofford Bros. Opinion by Court. Filed May 14, 1906. John M. Somervell, Clerk.

208 District Court United States, Texarkana Division,

Western District of Arkansas.

In Matter of Est. of E. M. Newton & Co., Bankrupts,

No. 145.

In Intervention of Swofford Bros. Dry Goods Co.

Now comes Swofford Bros. Dry Goods Co. by their attorneys, Webber & Webber, and comes the Trustee of the estate of E. M. Newton & Co., T. A. Bryant, by his attorneys, R. L. Searcy and W. H. Arnold, and the court having heretofore taken the matter of the intervention of said Swofford Bros. Dry Goods Co. under advisement, and being now fully advised as to the facts to said intervention and the law applicable thereto, is of opinion said intervention should be denied and dismissed because said intervenors are not entitled to recover therein.

It is therefore, by the Court, considered, ordered and adjudged, that the said Trustee of the estate of E. M. Newton & Co. be and he is hereby authorized to retain, as said Trustee, for adminstration under the Bankrupt Law, all the assets in his hands claimed by said Swofford Bros. Dry Goods Company, and that said Trustee have and recover of and from the said Intervenor all his costs in this cause expended.

209 In the United State District Court, Western District of

Arkansas, Texarkana Division.

In Re E. M. Newton & Co., Bankrupts.

On Intervention of Swofford Bros. Dry Goods Co.

Notice.

To Thad A. Bryant, Trustee of E. M. Newton & Co., Bankrupts, and to Messrs. R. L. Searcy and W. H. Arnold, Attornews of Record:—

You and each of you will please take notice that on Thursday, May 17, 1906, at the opening of Court, or as soon thereafter as counsel can be heard, Swofford Bros. Dry Goods Co., Intervenors hereing, claiming certain goods or the proceeds thereof, now in the hands of Thad. A. Bryant, as Trustee of

E. M. Newton & Co., Bankrupts, will apply to the Judge of the Texarkana Division of the Western District of Arkansas, for an allowance of an appeal, to the United States Circuit Court of Appeals, for the 8th Judicial Circuit, from the final judgment and decree of said District Court, entered of record on May 14th, 1906, wherein and whereby said Swofford Bros. Dry Goods Co., was finally denied the rights and privileges claimed by it under and by virtue of its contract entered into with the said E. M. Newton & Co., when and where you may be present, if you so desire.

SWOFFORD BROS. DRY GOODS CO.,
Intervenors.

By E. S. ELLIS and
WEBBER & WEBBER, Its Solicitors.

Received a copy of the foregoing notice at Texarkana, Ark., this 16 day of May, 1906.

R. L. SEARCY and
W. H. ARNOLD,
Solicitors for T. A. Bryant,
Trustee of E. M. Newton & Co.

Notice of Application for Appeal. Filed May 17th, 1906, in my office. John M. Somervell, Clerk.

210 Copy.

In the United State District Court, Western District of Arkansas, Texarkana Division.

In Re E. M. Newton & Co., Bankrupts,

On Intervention of Swofford Brothers Dry Goods Co.

Petition for Appeal.

Now comes Swofford Brothers Dry Goods Co., Intervenors herein, and complains, that in the record and proceedings in said cause, upon the claim of said Swofford Brothers to certain property in the hands of the Court, under and by virtue of a certain written contract entered into by and between the said Swofford Brothers Dry Goods Co. and the said E. M. Newton & Co., the bankrupts, bearing date the 20th day of July, 1904, before the Honorable District Court, that prejudicial error has been committed in that the Honorable District Court held, adjudged and decreed on May 14th, 1906, on the hearing of the intervention herein, that said contract was null and void as to creditors and as to said trustees, and

in entering its judgment and decree to that effect, to the great damage and injury of Intervenor aforesaid; to all of which several rulings and opinions of the Honorable District Judge and Court, said Intervenor then and there excepted, and now excepts, and assigns the same as error.

Intervenor files herewith a specification of the errors relied on, and asks that the record and testimony herein, or so must as is material to a clear understanding of the questions involved and of their determination, be certified upon appeal.

Wherefore, the said Swofford Brothers Dry Goods Co. prays an appeal and such processes as may cause the said errors to be corrected, and cause the said order, judgment and decree to be corrected by the Honorable, the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

211 E. S. ELLIS, and
WEBBER & WEBBER,

Solicitors for Swofford Brothers Dry Goods Co., Intervenors.

In Intervention of Swofford Bros. Dry Goods Co. Petition for appeal by Swofford Bros. Dry Goods Co. Filed in my office May 17, 1906. John M. Somervell, Clerk.

212 In the United States District Court, Western District of Arkansas, Texarkana Division.

In Re E. M. Newton & Co., Bankrupts.

On Intervention of Swofford Brothers Dry Goods Co.

Assignment of Errors.

Now comes Swofford Brothers Dry Goods Co., intervenor herein, by its solicitors, E. S. Ellis and Webber & Webber, and says that in the record and proceedings of said cause, relative to the claim of the said Swofford Brothers Dry Goods Co., under their contract with E. M. Newton & Co., executed by and between said Swofford Brothers Dry Goods Co. and E. M. Newton & Co., whereby and by virtue of which, and under the terms of which, said Swofford Brothers Dry Goods Co. sold and delivered to said E. M. Newton & Co., certain goods and merchandise, there is error in the following particulars, towit:

1st. Because the Court erred in failing to find and hold that the answer, filed by the Trustee herein, and under which he seeks to maintain a claim to the property in controversy, fails to set forth facts sufficient to constitute any claim, cause

of action, equity or ground of relief in favor of said Trustee.

2nd. Because the Court erred in holding that the contract entered into between Swofford Brothers Dry Goods Co. and E. M. Newton & Co., was not intended to make the sales of intervenors to the bankrupts conditional, but that the real intention was to secure them by a lien in the nature of a mortgage.

3rd. Because the Court erred in finding that the contract was kept secret.

4th. Because the Court erred in holding that said contract was a mortgage and not a conditional sale.

5th. Because the Court erred in holding as matter
213 of law that said contract was void.

6th. Because the Court erred in holding that said contract was a mortgage or lien on a stock of merchandise, with possession remaining in the mortgagor, and with full authority to sell the same in the usual course of business, without being required to pay over the proceeds to the mortgagee, and in holding as matters of law that said contract was a constructive fraud and vitiated it as against creditors and the trustee in bankruptcy, regardless of the intention of the parties.

7th. Because the Court erred in holding said contract void as against the trustee in bankruptcy herein.

8th. Because the Court erred in holding that the failure to record said contract vitiated it as against creditors and against the trustee in bankruptcy under the Bankrupt Act.

9th. Because the Court erred in dismissing the Intervention herein.

10. Because the Court erred in refusing to find for Intervenors herein as prayed in their intervention.

11th. That the Court erred in failing to find and hold that under the pleadings, the stipulation and the evidence that intervenor is entitled to recover the property in controversy in accordance with the prayer of its petition in Intervention filed herein.

Whereupon, Swofford Brothers Dry Goods Co., Intervenor herein, prays the correction of said judgment and decree by

the Honorable, the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

E. S. ELLIS, and
WEBBER & WEBBER,

Solicitors for Swofford Brothers Dry Goods Co.

On Intervention of Swofford Bros. Dry Goods Co. Assignment of Errors. Filed in my office this May 17, 1906. John M. Somervell, Clerk.

214 United States District Court, Texarkana Division,

Western District of Arkansas.

No. 145.

In Matter of Est. of E. M. Newton & Co., Bankrupts,

Intervention of Swofford Bros. Dry Goods Co.

On this 18th day of May, 1906, the application of Swofford Bros. Dry Goods Co., Intervenors herein, for an appeal from the judgment of this court and decree heretofore entered hrein, adjudging that a certain contract entered into by and between Intervenor and said Bankrupts, and dated July 20, 1904, to be null and void, comes on to be heard, and the Court being fully advised in the premises:

It is ordered that said Swofford Bros. Dry Goods Co. be allowed an appeal to the United States Circuit Court of Appeals, for the Eighth Judicial Circuit; conditioned, that said Swofford Bros. Dry Goods Co. file its bond on such appeal with good and sufficient surety in the sum of $500.00.

In Matter of Est. of E. M. Newton & Co., Bankrupts,

On the Intervention of Swofford Bros. Dry Goods Co.

It appearing to the court, that Swofford Bros. Dry Goods Co., the Intervenor herein, has perfected its appeal from the judgment and decree of this court filed herein, by filing its bond on appeal, as required by this court, and by the issuing of a citation upon the trustee of said bankrupts, it is therefore ordered that the judgment heretofore rendered herein by this court, and all proceedings thereon or thereunder, be and the same are hereby stayed, pending a hearing of said appeal.

215 In the United States District Court, Western District of Arkansas, Texarkana Division.

In Re E. M. Newton & Co., Bankrupts.

Bond on appeal of Swofford Bros. Dry Goods Co.

Know all men by these Presents, that we, Swofford Bros. Dry Goods Co. as principal, and ..... as surety, are held and firmly bound unto Thad A. Bryant, Trustee of E. M. Newton & Co., Bankrupts, in the sum of Five Hundred Dollars, to be paid to the said Thad A. Bryant, Trustee as aforesaid, his successors, heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselfves, our heirs, executors and administrators jointly and severally by these presents.

Sealed and dated this May 17, 1906.

Whereas at the May Term, 1906, of the United States District Court, for the Western District of Arkansas, Texarkana Division, in a matter pending in said court, in bankruptcy, to-wit: The Intervention of Swofford Bros. Dry Goods Co. in re E. M. Newton & Co., Bankrupts, the said Swofford Bros. Dry Goods Co. made a claim against certain goods, or the proceeds thereof, against said bankrupts' estate and the Trustee thereof, under and by virtue of a certain contract entered into by and between said Intervenor and said bankrupts, and judgment was rendered against said Intervenor; and said Intervenor having prayed and been allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment of the said District Court: Now, the condition of the above obligation is such that if said Swofford Bros. Dry Goods Co. shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of
SWOFFORD BROS. DRY GOODS CO.,

By E. S. Ellis, its Attorney.

W. R. GRIM.
H. F. OFFENHAUSER.

5-19, 1906. Approved.

JOHN H. ROGERS, Judge.

Approved May 19th, 1906.

United States of America,

Western District of Arkansas, Texarkana Division:

W. R. Grim and H. F. Offenhauser, surety on the within bond, being first duly sworn, deposes and say that they each are worth, in property, Five Hundred Dollars over and above all their just debts and liabilities, subject to levy and sale in execution.

W. R. GRIM,
H. F. OFFENHAUSER.

Subscribed and sworn to before me at Texarkana, Ark., this May 19, 1906.

[Seal] T. C. Tupper,
Notary Public, Miller Co., Ark.

Bond for Appeal. Filed May 19, 1906. John M. Somervell, Clerk.

216 United States of America,
Eighth Judicial Circuit—ss.

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America:

To Thad. A. Bryant, Trustee in the matter of E. M. Newton & Co., Bankrupts—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Judicial Circuit at the City of St. Louis, Missouri, sixty days from and after the date this Citation bears date pursuant to an appeal allowed by the District Court of the United States for the Western District of Arkansas, sitting at Texarkana, wherein Swofford Brothers Dry Goods Co., a creditor and intervenor in the Matter of E. M. Newton & Co., Bankrupts, is appellant and you are appellee, to show cause, if any there be why the decree rendered against said appellant as in said Appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Rogers, Judge of the District Court of the United States for the Western District of Arkansas this 19th day of May, A. D. 1906.

JOHN H. ROGERS, Judge.

Due and legal service of the within and foregoing citation on appeal together with the receipt of a copy thereof is hereby acknowledged and all further service of said Citation is

hereby waived this 19th day of May, A. D. 1906, by the Appellee therein named, Thad. A. Bryant, Trustee in the matter of E. M. Newton & Co., Bankrupts.

R. L. SEARCY and
W. H. ARNOLD,
Attys. for Trustee.

By W. H. Arnold.

217 In the United States District Court, Western District of Arkansas, Texarkana Division.

In Re E. M. Newton & Co., Bankrupts.

On Intervention of Swofford Bros. Dry Goods Co.

Petition for Supersedeas.

Comes Swofford Bros. Dry Goods Co., Intervenor, and shows to the Court that it has complied with the order of the Court allowing its appeal, by filing bond as required by the court, which bond has been by the Court approved, and said Intervenor prays that a supersedeas issue pending the hearing of said appeal staying execution of the judgment herein.

SWOFFORD BROS. DRY GOODS CO.,

By E. S. Ellis, and
Webber & Webber,
Attorneys for Intervenor.

Copy received.

R. L. SEARCY and W. H. ARNOLD,
Attys. for Trustee.

Petition for Supersedeas. Filed in open court May 19, 1906. John M. Somervell, Clerk.

218 In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the Matter of E. M. Newton & Co., Bankrupts.

In Bankruptcy.

Your petitioner, Swofford Bros. Dry Goods Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, respectfully shows to the court, that heretofore, to-wit, on the 20th day of July, 1904, it entered into a written contract with the above named bankrupts, wherein and whereby it agreed to sell and deliver to said bankrupts, certain merchandise upon the express condi-

tions that the title and right to possession of said merchandise should be and remain vested in your petitioner, and the title and right to possession of all cash, notes and accounts received by said bankrupts, as the proceeds derived from the sale of any of the merchandise so sold and delivered them by your petitioner under and by virtue of the contract aforesaid, should be and remain vested in your petitioner until the full purchase price and agreed value of all the merchandise so 1905, your petitioner sold and delivered to said bankrupts should be fully paid. A true copy of which said contract is hereto attached, marked Exhibit A and made a part hereof.

And your petitioner further shaws that at divers dates between said 20th day of July, 1904, and the first day of May, 1905, you rpetitioner sold and delivered to said bankrupts merchandise, under and pursuant to the terms of said contract, of the actual and agreed contract value, and at the stipulated price of to-wit, the sum of $15369.57.

And your petitioner further shows that afterward, on the 30th day of June, 1905, the said bankrupts, having up to that time only paid to your petitioner, to apply upon the purchase price of said merchandise, the sum of $2059.01 in cash, in goods returned and in discounts allowed, and being at that time indebted to your petitioner on account of the merchandise so delivered to them under said contract, as aforesaid, in the aggregate sum of $13210.56, with accrued interest thereon, voluntarily and pursuant to the terms of said contract, returned and delivered to your petitioner, all of the merchandise then remaining in their possession, which had been so sold and delivered to them by your petitioner under the terms of said contract, said merchandise so returned invoicing at original cost price the sum of $5337.21. And at the same time pursuant to said contract and under and in accordance with its terms, said bankrupts endorsed and de-
219 livered to your petitioner notes of the face value of $1684.32, and assigned and delivered to your petitioner accounts of the face value of $8277.04, as being the notes and accounts received by such bankrupts as the proceeds derived by them from the sale, in the ordinary course of business, of merchandise sold and delivered to them by your petitioners under and by virtue of the contract above mentioned. Said assignment is in writing, and a copy thereof marked Exhibit B is hereto attached and made a part hereof.

Your petitioner further shows that afterward, on the 3rd day of July, 1905, said bankrupts filed their voluntary peti-

tion, in this court, and on the same day they were duly adjudged bankrupts under the acts of Congress relating to Bankruptcy; and on the same day one T. A. Bryant, was by this court, upon proper application therefor, duly appointed receiver of the estate of said bankrupts, and said Bryant, then and there duly qualified and entered upon the active discharge of the duties of said office.

And thereupon said receiver, acting under the general orders of the court directing and requiring him to seize and take possession of all the estate, real and person, of said bankrupts, and all their deeds, books of accounts and papers, demanded of your petitioner that it deliver to him the merchandise and notes and accounts hereinbefore mentioned and described, as having been delivered to your petitioner by said bankrupts under the terms of said contract, all of which were at that time in the sole and exclusive possession of your petitioner and held by it under a claim of title adverse to said bankrupts and to said receiver. And your petitioner then and there, claiming to be entitled to the possession of said property as against said receiver, by virtue of the facts hereinbefore stated, and acting under the advice of its counsel, absolutely declined and refused to surrender to the said receiver the possession of said property so by him demanded.

But afterward, on the 4th day of July, 1905, a written agreement and stipulation was entered into by and between your petitioner and said receiver, acting under the direction and with the approval of this court, by and through the Hon. A. H. Sevier, referee, wherein and whereby it was stipulated and agreed that said property aforesaid should be delivered to said receiver upon the express terms and conditions in said contract set forth. A true copy of said stipulation and agreement is hereto attached marked Exhibit C and made a part hereof.

And upon the execution of said stipulation and agreement and its approval by this court, by and through the said receiver, your petitioner, under and by virtue of its terms did deliver said merchandise and said notes and accounts
220 to said receiver.

And your petitioner further shows that said receiver, acting under and by virtue of the stipulation last mentioned, and by and with the consent and approval of this court, did on the 13th day of July, 1905, in connection with the sale of other property belonging to the estate of said

bankrupts, and after due advertisement of same, offer for sale at public auction, and sell to the highest bidder, the merchandise hereinbefore mentioned, at and for the sum of $3135.00, that being the highest and best bid received therefor. And at the same time the receiver offered for sale at public auction, after due notice and advertisement, the notes and accounts aforesaid, and received therefor a bid of $2,000.00, as the highest and best bid offered. And your petitioner further shows that upon report of said sale being made by said receiver, the sale of said merchandise was duly approved by the court, and an order was then and there duly made directing said receiver to hold the proceeds derived from the sale of said merchandise to wit; the said sum of $3135.00, in a separate and distinct fund, under and in accordance with the terms of the stipulation, so as aforesaid entered into by and between your petitioner and said receiver; and the court then and there refused to confirm and approve the sale of said notes and accounts at and for the sum of $2000.00, and said sale was thereupon vacated and set aside, as to said notes and accounts, and the same remained in the possession of said receiver.

And afterward on the same day, towit, the 13th day of July, A. D. 1905, at a meeting of the creditors of said bankrupts duly held at the office of the said Hon. A. H. Sevier, referee, the said T. A. Bryant, so as aforesaid appointed receiver, was by the creditors of said bankrupts and by and with the approval of said receiver, duly elected and qualified as trustee of the estate of said bankrupts; and thereupon the said sum of $3135.00 so as aforesaid before that time held by said receiver as a separate and distinct fund under the order of the court and the terms of the stipulation, passed into the hands of said T. A. Bryant as trustee, who, ever since, has held and now holds and retains the same as a separate and distinct fund for the purposes in said stipulation mentioned; and thereupon also said notes and accounts passed from the hands of said T. A. Bryant, as receiver, into the hands of said T. A. Bryant as Trustee, who ever since has held and now holds the same together with the proceeds derived therefrom, as hereinafter mentioned, under the terms of said stipulation. And your petitioner is informed and believes and therefore avers, that said receiver and said trustee have at different times received certain moneys and certain merchandise and other property, in payment and in settlement, or in part payment and in part settlement of said notes and accounts, but
221 the exact amount of money and the exact kind, quan-

tity and value of the merchandise and property so received by said receiver and trustee in such collection and settlements is to your petitioner unknown, but it is informed and believes that whatever money has been so received by said receiver and trustee has been added to said sum of $3135.00, and is by said trustee held as a part of said separate and distinct fund, and whatever merchandise has been so received by said receiver and trustee, is by said trustee now held separate and apart for the purposes expressed in the stipulation last mentioned, and that the title and right to possession thereof, being the same as the title and right to possession of the notes and accounts themselves, may be adjudicated and determined in this court in these proceedings.

Wherefore, your petitioner prays that a decree may be entered by this court adjudging that at the time of the filing of the petition in bankruptcy herein, by said bankrupts, and at the time of appointing a receiver herein, your petitioner was entitled to the possession of said merchandise and of said notes, and accounts, so as aforesaid delivered to it by said bankrupts, under the terms and by virtue of said contract, marked Exhibit A, and is now entitled to have and receive from said trustee the proceeds derived from the sale of said merchandise, towit; the said sum of $3155.00, and to have and receive from said Trustee, said notes and accounts together with all the proceeds derived from the collection and settlement of the same, whether in money or in merchandise or in other property; and it further prays that an order may be made directing said trustee to turn over and pay to your petitioner, the said sum of $3155.00 so derived from the sale of said merchandise and so held by said trustee as a separate and distinct fund, and to turn over and deliver to your petitioner said notes and accounts, together with whatever has been received and realized in the collection and settlement thereof, whether in money or in merchandise and other property, that your petitioner may recover its costs, including an allowance for attorney's fees herein, and have such other and further relief in the premises, as may be deemed just and equitable.

SWOFFORD BROS. DRY GOODS CO., Petitioner.

WEBBER AND WEBBER,
SCOTT & HEAD,
E. S. ELLIS,
Attorneys for Petitioner.

222 State of Missouri,
County of Jackson—ss.

E. S. Ellis, being duly sworn, deposes and says that he is one of the attorneys for and the duly authorized agent of Swofford Bros. Dry Goods Company, the petitioner above named, and makes this affidavit in its behalf for the reason that none of the officers of said corporation are within the State of Arkansas, and because and for the further reason, that the facts set forth in said petition are peculiarly within his own personal knowledge, he having had personal charge of this matter on behalf of said petitioner; and affiant further says that he has read the foregoing petition and knows the contents thereof, and that the statements made therein are true, except such as are made upon information and belief, and as to those statements, he verily believes the same to be true.

E. S. ELLIS.

Subscribed and sworn to before me this 5th day of August, 1905. My commission expires Jany. 26, 1908.

(Seal) WM. A. RANKIN,
Notary Public in and for said County.

223 Exhibit A.

Know All Men By These Presents:

That E. M. Newton & Company of New Lewisville, Lafayette County, Arkansas, a co-partnership composed of E. M. Newton and J. F. Newton, party of the first part, has this day purchased from Swofford Bros. Dry Goods Company, and said Swofford Bros. Dry Goods Company, party of the second part, has sold to said E. M. Newton & Company, certain goods upon the following express conditions:

1. Said goods shall be selected by said first party from samples, or from the stock of the said second party at Kansas City, Missouri, and same shall be shipped to said first party upon their request, to New Lewisville, Arkansas, from which place they shall not be removed without the consent of said second party, save and except, that said first party shall have the right to sell said goods in the ordinary course of business, but not otherwise.

2. Said second party shall prepare, at the time of shipment, full and complete invoices of the goods so sold and selected, and shall deliver copies of said invoices by

mail, or otherwise, to said first party. Such invoice shall consist of itemized list of the articles so sold and shipped, with the price and value of each article, and shall show also the credit terms upon which the same are sold, and the rate of discount, if any, which is to be allowed upon payment of the purchase price in cash upon delivery, or at an earlier date than that specified in said credit terms.

3. The title to and the right to immediate possession of all the goods so sold and shipped by the said Swofford Bros. Dry Goods Company and of the proceeds derived from the sale of same, by first party, whether in cash, note or book account, shall be vested and remain in said Swofford Bros. Dry Goods Company until the full purchase price and the agreed value of the same shall be paid by E. M. Newton & Company to the said Swofford Bros. Dry Goods Company in cash; and any and all notes, checks and accepted drafts shall not be considered as payment, but merely as evidence of indebtedness. And upon taking possession of any notes and book accounts derived by said party of the first part from the sale of said goods, or any part thereof, said Swofford Bros. Dry Goods Company shall have the right to collect the same either in its name or in the name of E. M. Newton & Company, by suit or otherwise, and case of disputed notes and accounts, against persons of doubtful solvency, said second party may compromise and settle the same, or may extend the time of payment thereof, in such manner and upon such terms as may be to it seem most advantageous, and any new notes taken therefor, whether in the name of E. M. Newton & Company, or in the name of said Swofford Bros. Dry Goods Company shall be held and considered in all respects the same as in the original evidences of indebtedness.

224 4. This contract and the terms thereof shall apply to all future orders given by E. M. Newton & Company and to all future sales and shipments made to them by said Swofford Bros. Dry Goods Company so long as any part or portion of the purchase price of the goods sold and delivered hereunder shall remain unpaid, said Swofford Bros Dry Goods Company shall have the right to terminate this contract at any time, and said E. M. Newton & Company may terminate the same at any time by paying in full in cash whatever balance of the purchase price of the goods purchased and shipped shall then remain unpaid.

Delivery of the goods, properly packed and marked, to a common carrier at Kansas City Missouri, consigned to first

party, as above specified, shall be deemed and considered a full and complete delivery thereof by said second party and all freight and transportation charges shall be paid by said consignees.

The acceptance of goods, subsequently sold and shipped, by first party and placing of the same in their warehouse at New Lewisville, Ark., or elsewhere, shall be held and considered sufficient to bring such goods within and under the terms of this contract, and it shall not be necessary or essential that the fact that goods ordered by first party or sold and shipped by second party are within and under the terms hereof, shall be mentioned or referred to in the orders so given or in the invoices given and delivered with each shipment.

Said first party shall keep all goods purchased hereunder properly insured at their own expense for the benefit of second party, but the loss or destruction of such goods by fire or otherwise, shall not cancel the indebtedness thereof but said first party shall still remain liable to second party for any part of the purchase price remaining unpaid.

In Witness Whereof the parties above named have placed their hands and seals in duplicate this 20th day of July, 1904.

E. M. NEWTON & CO.
SWOFFORD BROS. DRY GOODS CO.

By W. H. Moore, Secretary.

225 Exhibit B.

In pursuance of our contract, dated July 29th, 1904, with Swofford Bros. Dry Goods Company, and for value received, we hereby sell, assign, transfer and deliver to said Swofford Bros. Dry Goods Company, the following book accounts aggregating $8277.04, due and payable to us for goods of the said Swofford Bros. Dry Goods Company, sold and delivered by us to customers here listed under contract above referred to.

Witness our hands this 30th day of June, 1905.

E. M. NEWTON & CO.

By E. M. Newton.

Witness: Leo Krause.

(Here, on the original, follows a list of names with the amount due from each, which are omitted for the sake of brevity.)

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Exhibit C.

In the U. S. Court for the Western District of Arkansas
Texarkana Division.

In Re E. M. Newton & Co., Bankrupts.

In Bankruptcy.

Agreement by and between Swofford Bros. Dry Goods Company and T. A. Bryant, Receiver of the above named estate, with reference to certain property in the hands of said company.

Whereas E. M. Newton & Co., the above named bankrupts, on the 30th day of June, 1905, returned and delivered to Swofford Bros. Dry Goods Company, merchandise invoicing, at original cost price, $5337.21, which had been sold and delivered to said bankrupts by said Swofford Bros. Dry Goods Company, under and by virtue of a written contract between said parties, bearing date of July 20th, 1904, and at the same time pursuant to said contract said bankrupts transferred and delivered to said Swofford Bros. Dry Goods Company notes of the face value of $1684.32 and accounts of the face value of $8277.04 which are hereby admitted to be the proceeds of other merchandise sold and delivered by said Swofford Bros. Dry Goods Company to said bankrupts under and by virtue of the contract aforesaid, and by said bankrupts sold and delivered to their customers in the regular course of trade pursuant to said contract, and said Swofford Bros. Dry Goods Company are in the actual, sole, exclusive and adverse possession of said merchandise, notes and accounts above mentioned, and have refused to surrender the possession of the same to the receiver of the estate of said bankrupts, except under the admission, terms and stipulations of this agreement and whereas the receiver of said estate now claims, and the trustee to be hereafter elected may claim, that said merchandise, notes and accounts belong to the estate, now therefore, to avoid deterioration in the value of said property which would necessarily ensue pending any litigation or proceedings that may arise concerning same, it is hereby stipulated and agreed by and between Swofford Bros. Dry Goods Company and T. A. Bryant, Receiver herein, by and with the authority and approval of the Referee in Bankruptcy, that the said merchandise, notes and accounts held by the said Swofford Bros. Dry Goods Company may be offered for sale by the Receiver at the time and place of sale of the stock of

merchandise of the above named estate now in its hands, it be-
agreed and understood that the notes and accounts herein
referred to shall be sold separately and apart from the bal-
ance of the property, and that said merchandise shall be first
offered for sale separate and apart from said other
227 property, and the highest and best price there bid for
same shall be deemed and considered the price received
therefor, even though the said receiver or trustee may there-
after, if he deem it advisable, sell all merchandise, including
that herein referred to, in bulk; and upon making said sale
said receiver shall take from the proceeds and set apart, as
a separate fund, the amount received from the sale of the
notes and accounts aforesaid, and shall also set apart in said
separate fund, an amount of money equal to the highest bid
received on said merchandise when offered separately, and the
amount thus set apart for the notes and accounts and said
merchandise shall be held by the court and deposited in bank
until all questions regarding the title of possession to same
have been finally settled and determined by a court of com-
petent jurisdiction, whereupon, if determined in favor of
Swofford Bros. Dry Goods Company said amount is to be
forthwith turned over to said Swofford Bros. Dry Goods
Company, or its attorney, free and discharged of all fees,
charges and expenses of whatever kind or nature; and it is
further agreed and understood that the fund so derived from
the sale of said merchandise and notes and accounts aforesaid
and held intact as a separate fund shall remain and be in
lieu of the property so sold, and the title and right of posses-
sion of the Swofford Bros. Dry Goods Company in and to said
fund shall be and remain the same as its title in and to the
merchandise, notes and accounts aforesaid.

It is further agreed and understood that said Swofford Bros. Dry Goods Company is to be in no wise prejudiced by the fact that the proceeds of said sale are paid into and retained by said court until the termination of such litigation as may arise.

(Signed) SWOFFORD BROS. DRY GOODS COMPANY.

By E. S. ELLIS, its Attorney.

T. A. Bryant, Receiver.

Approved. A. H. Sevier, Referee.

Filed 8, 10-05. A. H. Sevier, Referee.

228 In the United States District Court Western District of Arkansas Texarkana Division.

In Matter of E. M. Newton & Co., Bankrupts.

In Bankruptcy.

Answer of trustee to petition of Swofford Bros. Dry Goods Company.

Comes Thad A. Bryant, as trustee of the estate of E. M. Newton & Co., bankrupts, and for answer to the petition of Swofford Bros. Dry Goods Company herein says: That he admits that petitioners are a corporation, duly organized and existing by virtue of the laws of the State of Missouri; admits that petitioners, on the 20th day of July, 1904, entered into a contract with the above named bankrupts, and that Exhibit "A", as attached to its said petition is a copy thereof.

That he has no knowledge or information as to the divers sales of goods between the said 20th day of July, 1904, and the 1st day of May, 1905, made under and pursuant to the terms of said contract, or that said sales were of the actual and agreed value of $15369.57, and he denies same.

That he has no knowledge or information as to the true amount bankrupts had paid to petitioners up to the 30th day of June, 1905, in cash, in goods returned and in discounts allowed, nor does he know the aggregate sum due to petitioners from bankrupts on said day, and he asks strict proof of said credits and charges.

Admits that said bankrupts did on said 30th day of June, 1905, surrendered to petitioners, goods and merchandise, invoicing, at original cost price, the sum of $5337.21; but denies that all said goods so surrendered were the goods bought from petitioners, but avers the truth to be that a large portion of said goods were bought from other wholesale houses; creditors of this bankrupt; admits that at the same time, said bankrupts endorsed and delivered to petitioners accounts of the value of $1684.32, and also assigned and delivered to petitioners accounts of the face value of $8277.04, but he denies that said notes and accounts so sold and transferred represented wholly, and exclusively the proceeds derived from the sale of goods bought from petitioners, but he is informed and believes that a large part of the amount of said notes and accounts, at least fifty percent, thereof, is the proceeds of goods sold and bought by said bankrupts from other of their

creditors, and he so charged. Says that the purpose of the said contract relied upon, marked Exhibit "A" and attached to petitioners' petition, and the attempted transfer and
229 delivery of goods and notes and accounts thereunder was to procure and retain a secret lien on bankrupt's property, and an unconscionable advantage over the other creditors; that the said goods, so sold thereunder, were delivered to bankrupts to be sold in the ordinary course of trade; and that it was the intention of the petitioners at the time of entering into said contract with said bankrupts to sell convey and divest petitioners of all their title to said merchandise sold under and pursuant to said contract; and that its alleged retention of title to said goods so sold was not in good faith, against public policy, and is fraudulent and void against the creditors of this bankrupt.

Wherefore, your trustee prays the decree of this court establishing and quieting the title to said property in the trustee of this estate, and that he have and hold the funds arising from the proceeds of this property, to be converted into the general fund of this estate, for the proper distribution and settlement, and that he may recover his costs and have such other relief as may be just and equitable.

T. A. BRYANT, Trustee.

W. H. ARNOLD,
R. L. SEARCY,
Attorneys for Trustee.

Answer of Trustee to petition of
Swofford Bros. Dry Goods Co.

Filed 8-16-05, A. H. Sevier, Referee.

230 In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the matter of E. M. Newton & Co., Bankrupts.

Amendment to Answer of Trustee.

Now comes Thad A. Bryant, the trustee in the above entitled cause, and on leave of the court asked and obtained, files the following as an amendment to his answer heretofore filed herein, said amendment to follow the first paragraph of the second page of said answer.

And said Trustee admits that there was a stipulation en-

tered into on the 4th day of July, 1904, between the receiver appointed in this cause and Swofford Bros. Dry Goods Company, which was approved by the Hon. A. H. Sevier, Referee in bankruptcy; but that said trustee states that said stipulation was entered into under a mistake of fact on the part of the receiver and referee, but not on the part of said Swofford Bros. Dry Goods Company, in this, that the said Swofford Bros. Dry Goods Co., represented to said receiver and referee, and schedule A attached to the petition in bankruptcy also stated, that the goods which had been turned over to said Swofford Bros. Dry Goods Co. by the bankrupts, E. M. Newton & Co., were goods which had been sold under the contract of July 20, 1904, between Swofford Bros. Dry Goods Co. and E. M. Newton & Co., a copy of which is to said intervention, when in fact said representation of said Swofford Bros. Dry Goods Co. and said statement attached to Schedule A aforesaid, were not true and that a large part of said goods turned over to Swofford Bros. Dry Goods Co. had not been sold or delivered under said contract of July 20, 1904, but had been bought by said E. M. Newton & Co. from other creditors, and if said referee had known said facts, as they were known by the Swofford Bros. Dry Goods Co., they would not have made said agreement of July 4, 1905.

The said Trustee further states that it was also represented by said Swofford Bros. Dry Goods Company, the said referee and receiver, and also shown by said Schedule A, attached to said petition, of the bankrupts, at the time of said agreement of July 4, 1905, was made, that the notes and accounts which were delivered by the said E. M. Newton & Co. to said Swofford Bros. Dry Goods Co., represented the purchase price of goods which had been sold by the said Swofford Bros. Dry Goods Co. to said E. M. Newton & Co. under said contract of July 20, 1904, when in truth and in fact the greater part of said notes and accounts did not represent the purchase price of goods which had been purchased by said E. M. Newton & Co. from Swofford Bros. Dry Goods Co., but the greater
231 part of goods which had been purchased by the said E. M. Newton & Co. from other creditors and were not subject to the provision of said contract of July 20th, and this trustee alleges that said referee and said receiver were deceived by the representations of said Swofford Bros. Dry Goods Co. and by the said Schedule A, attached, to the bankrupt's petition, and relying upon the belief that said contract of July 20th, 1904 covered the goods so turned over and the notes and accounts so assigned to said Swofford Bros.

Dry Goods Co., made the said agreement which they would not have made if they had not been deceived by the said Swofford Bros. Dry Goods Co. and by the said Schedule A, and said Swoffrd Bros. Dry Goods Co., in procuring said agreement acted in fraud of all other creditors of said E. M. Newton & Co. and have gained a material advantage over them by reason of said fraudulent representations which induced the making of said agreement by said referee and receiver.

The said Trustee further represents that even if said trustee and referee had not been deceived by the false and fraudulent representations of the said Swofford Bros. Dry Goods Co., and Schedule A, at the time said stipulation was entered into, the same is not valid and binding upon the general creditors of said estate because no creditor at that time was represented in making said agreement, no claim had been filed or allowed and no trustee had been appointed and it was beyond the power of the receiver or the referee to make an agreement of the kind mentioned and especially when the receiver and referee were misled as hereinaftr shown.

R. L. SEARCY,
W. H. ARNOLD,
Attorneys for Trustee.

Amendment to Answer of Trustee.

Filed 8-29-05, A. H. Sevier, Referee.

232 In the U. S. Court for the Western District of Arkansas Texarkana Division.

In Re E. M. Newton & Co., Bankrupts.

In Bankruptcy.

On Intervention of Swofford Bros. Dry Goods Co.

Reply to Answer of Trustee.

Swofford Bros. Dry Goods Co., Intervenor herein, replying to the answer of the Trustee, says that by reason of the act of the bankrupts in delivering the notes and accounts in controversy to Swofford Bros. Dry Goods Co., as the proceeds of the sale of goods received under the contract of July 20th, 1905, more particularly shown by the assignment attached to the intervention and marked Exhibit "B", said Trustee is estopped to deny that the notes and accounts referred to in said intervention are the proceeds of goods sold by the intervenor to the bankrupts.

And, replying especially to the amendment to the trustee's answer filed herein, Intervenor denies that the stipulation of July 4th, 1905, by and between this Intervenor and T. A. Bryant, Receiver, and approved by the Referee, was executed under a mistake of fact on the part of either the Receiver or the Referee, or that they were deceived by Swofford Bros. Dry Goods Co.; said Intervenor alleges that, being then and there in the actual, sole, exclusive and adverse possession of the merchandise, notes and accounts, which are the subject of this controversy, the Receiver and the Referee were very solicitous that it surrender the possession thereof, to the estate in bankruptcy; that said Receiver, and more particularly the Referee, were fully advised and knew all the facts and circumstances then and now within the knowledge of this intervenor; that prior to, and at the time of, the execution of the stipulation aforesaid they discussed with this Intervenor, to whom bankrupts represented that the notes and accounts herein referred to are the proceeds of its goods, the question of its ultimate title thereto, and as to the said notes and accounts covering sales of its goods, said receiver and referee were advised that, having possession thereof as well as the merchandise herein referred to, Intervenor desired to maintain its possession and let any action in regard thereto be instituted by the Trustee so that he might have the burden of proof; and said Receiver and said Referee determined that it would be to the best interest of the estate for the said Receiver to enter into said agreement with the Intervenor, and, after due and careful consideration, said Referee approved the same.

Intervenor says that the Referee and the Receiver
233 knew, and said stipulation between them and the Intervenor shows on its face, that it was only because that it was conceded in said stipulation that the merchandise surrendered was that bought from the Intervenor and the notes and accounts are the proceeds of its goods that this Intervenor agreed to said stipulation and permitted said Receiver to take possession of the property in controversy for the purpose therein expressed.

Intervenor says further that the Trustee herein now has possession of the proceeds of the sale of the merchandise, and the notes and accounts, and holds the same under and by virtue of the stipulation aforesaid, and that said Trustee has not offered to return said property or the proceeds thereof to Swofford Bros. Dry Goods Co., and that he is therefore

estopped to deny any of the admissions or terms of said stipulation, and is not entitled to have the same rescinded or set aside for fraud or mistake or want of authority on the part of the court or its Receiver to make the same.

And Intervenor says that said stipulation having been entered into by the Receiver and approved by the court after due consideration and determination as the best course in the interest of said estate, was strictly within the power and jurisdiction of the court, and is valid and binding upon the Court and its officers and all parties interested herein, and the statement of facts therein must be taken and held as conclusive upon all parties hereto.

SWOFFORD BROS. DRY GOODS CO.

By E. S. Ellis, Webber & Webber.

State of Arkansas,
Miller County—ss.

E. S. Ellis being duly sworn deposes and says (Its Attorneys.)

That he is one of the attorneys for the duly authorized agent of Swofford Bros. Dry Goods Company, the petitioner herein above named, and makes this affidavit in its behalf, for the reason that the facts set forth in said petition and in this reply are peculiarly within his own personal knowledge he having had the personal charge of this matter on behalf of said petitioner; and affiant further states that he has read the foregoing reply and knows the contents thereof, and that the statements made therein are true, except such as are made upon information and belief, and as to those statements, he verily believes the same to be true. E. S. ELLIS.

Subscribed and sworn to before me this 30th day of August, 1905. A. H. Sevier, Referee.

Reply of Swofford Bros. Dry Goods Co. to the Answer of the Trustee.

Filed 30th day of August, 1905.

A. H. Sevier, Special Master and Referee.

234 In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

In the matter of E. M. Newton & Co., Bankrupts.

Amended and Substituted Answer of Trustee.

Now comes Thad A. Bryant, the Trustee in the above entitled cause, and on leave of the court, asked and obtained, files the following as an amended and substituted answer to his answer heretofore filed herein and says that there was a stipulation entered into on the 4th day of July, 1905, between the receiver appointed in this cause and Swofford Bros. Dry Goods Co., which was approved by the Hon. A. H. Sevier, referee in bankruptcy, but the said trustee states that said stipulation was entered into under a mistake of fact on the part of said receiver and referee, but not on the part of said Swofford Bros. Dry Goods Co., in this: That the said Swofford Bros. Dry Goods Co., represented to said receiver and trustee, and schedule "A" attached to the petition in bankruptcy also stated, that the goods which had been turned over to said Swofford Bros. Dry Goods Co., by the bankrupts E. M. Newton & Co., were goods which had been sold under the contract of July 20th, 1904, between Swofford Bros. Dry Goods Co. to E. M. Newton & Co., a copy of which is attached to said intervention, when in fact said representation of said Swofford Bros. Dry Goods Co., and said statement attached to Schedule "A" aforesaid, were not true and that a large part of said goods turned over to said Swofford Bros. Dry Goods Co., had not been sold or delivered under said contract of July 20th, 1904, but had been bought by said E. M. Newton & Co. from other creditors, and if said referee and receiver had known said facts, as they were known by the Swofford Bros. Dry Goods Co., they would not have made said agreement of July 4th, 1905.

The said trustee further states that it was also represented by said Swofford Bros. Dry Goods Co., the said Receiver and Referee and was also shown by the said Schedule "A", attached to said petition of bankrupts at the time of said agreement of July 4, 1905, was made, that the notes and accounts which were delivered by the said E. M. Newton & Co. to said Swofford Bros. Dry Goods Co., represented the purchase price of goods which had been sold by the said Swofford Bros. Dry Goods Co. to said E. M. Newton & Co., under said contract of July 20, when in truth and in fact, the greater part of said notes and accounts did not represent the purchase price of goods which had been purchased by said E. M. Newton & Co. from said Swofford Bros. Dry Goods Co., but the greater part of said notes and accounts represented the purchase money of goods which had been purchased by the said Newton & Co. from other creditors and were not subject to the

235 provisions of said contract of July 20, 1904, and this trustee alleges that said receiver and referee were deceived by the representations of said Swofford Bros. Dry Goods Co. and by said Schedule "A" attached to the bankrupts ptition, and relying upon the belief that said contract of July 20, 1904 covered the goods so turned over and the notes and accounts so assigned to said Swofford Bros. Dry Goods Co., made said agreement which they would not have made if they had not been deceived by the said Swofford Bros. Dry Goods Co., and by the said schedule "A", and said Swofford Bros. in procuring said agreement acted in fraud of all other creditors of said E. M. Newton & Co., and have gained a material advantage over them by reason of said fraudulent representation which induced the making of said agreement by said Referee and said Receiver. The said Schedule "A" attached to the petition of the bankrupts was not read by said bankrupts and the contents thereof, hereinbefore detailed, were not known to said bankrupts when they filed said petition in bankruptcy, but said statements in regard to said notes and accounts being the proceeds of goods sold by Newton & Co., purchased from Swofford Bros. Dry Goods Co., were made a part of said Schedule "A" without the knowledge or consent of the said bankrupts and the same was untrue. The said trustee further represents that even if said trustee and referee had not been deceived by the false and fraudulent representations of Swofford Bros. Dry Goods Co., and said Schedule "A", at the time said stipulation was entered into, the same is not valid and binding upon the general creditors of said estate because no creditor at that time was represented in making said agreement, no claim had been filed or allowed and no trustee had been appointed and it was beyond the power of the receiver or the referee to make an agreement of the kind mentioned and especially when the receiver and referee were misled as hereinbefore shown.

The Trustee further states that said contract relied upon, marked Exhibit "A", and attached to petitioners petition, was not entered into in good faith, as therein expressed and stipulated with the honest purpose and intention to retain title to goods sold to E. M. Newton & Co., until paid for, but avers the truth to be that said contract was made and signed by Moore on the part of Swofford Bros. Dry Goods Co., and by E. M. Newton on behalf of E. M. Newton & Co. with the express understanding and agreement that the same should not be admitted to record and that the existence of said con-

tract should not in anyway be divulged or made known to the creditors of said E. M. Newton & Co., but that it should be held and kept as a secret and confidential contract between the parties thereto and for the protection and preference of Swofford Bros. Dry Goods Co., in the event of the insolvency of said E. M. Newton & Co. that it was understood that
236 the goods sold and to be sold since the execution of said contract were to go into the general stocks of said E. M. Newton & Co., both their wholesale and retail stores, to be placed along with and among goods bought from other creditors, of said Newton & Co. to be sold in the ordinary course of trade; that no notice whatever was given to the commercial world of the existence of said contract and that the same operated and had the effect and was so intended by the parties thereto to give the said Newton & Co. a false credit based upon their apparent ownership of said goods; that it is and was intended as a secret lien and for the purpose of obtaining an unconscionable advantage over other creditors, that it is against public policy and the efficient operation of the Bankrupt Act and is fraud intent and void against the creditors of Newton & Co. and this trustee.

Wherefore sad trustee prays the decree of this court establishing and quieting the title to said property in the trustee of this estate and that he have and hold the funds arising from the sales of this property and that it be converted and turned into the general fund of this estate for settlement and that he may recover his costs and have such other relief as may be just and equitable.

R. L. SEARCY &
W. H. ARNOLD,
Attorneys for Trustee.

Amended and substituted answer of Trustee.

Filed 9-1-05. A. H. Sevier, Referee and Special Master.

237 In the United States District Court, Western District of Arkansas, Texarkana Division.

In Re E. M. Newton & Co., Bankrupts.

On Intervention of Swofford Bros. D. G. Co.

Objection to filing of amended and substituted answer of the trustee and motion to strike same from the files.

On this Sept. 1st, 1905, come Swofford Bros. Dry Goods Co. and enters its objection and protest against the said Trustee

being permitted by the court to file an amended and substituted answer herein at this stage of the case, and moves to strike the same from the files of this court,

SWOFFORD BROS. DRY GOODS CO.

By E. S. Ellis and Webber & Webber,
Its Attorneys.

Objection to filing amended and substituted answer and motion to strike it from the files.

Filed in my office this 1st day of Sept., 1905, at 5 P. M.

A. H. Sevier, Referee and Special Master.

238 In the District Court of the United States, Texarkana Division Western District of Arkansas.

In Re E. M. Newton, Bankrupts.

On Intervention of Swofford Bros. D. G. Co.

Intervenors' reply to amended and substituted answer of the Trustee.

Comes Swofford Bros. Fry Goods Co., the Intervenor herein, and still objecting and protesting against the Trustee being permitted, at this stage of the case, to file an amended and substituted answer, and reserving all rights under its objection and protest and motion to strike said amended and substituted answer from the files, for reply to the same says:

Said Intervenor denies that said stipulation was entered into under a mistake of fact on the part of the Receiver and Referee, but not on the part of Swofford Bros. Dry Goods Co. but says the facts were equally known to all parties to said stipulation. Intervenor denies that said stipulation was entered into by reason of any fraud or misrepresentation on the part of the Swofford Bros. Dry Goods Co., or its agents, and denies that any part of the goods delivered to them by Newton & Co. had not been sold and delivered under the contract of July 20th, 1904, and denies that any part of said goods had been bought from other creditors of said Newton & Co., and denies that Swofford Bros. Dry Goods Co., or its agents had any such knowledge at the time of said delivery or at any time since, or now has any such knowledge.

2nd. Said Intervenor denies that it made any representations to said Receiver, or said Referee as to the notes and accounts other than the same had been delivered to it by said

bankrupts as the proceeds of the sale of Swofford Bros. Dry Goods Co.'s goods; and denies that said Receiver or Referee were deceived by any representations of Swofford Bros. Dry Goods Co., or it's representatives, or that said Receiver or Referee relied upon any representations of the Intervenor or its representatives; and Intervenor denies that it acted in fraud of other creditors or that they made any representations to deceive said Receiver or Referee. They deny that the statement in Schedule "A" was not read by said bankrupts or was not known to them when the same was written and the petition filed or that said statement was made a part of said Schedule "A" without the knowledge or consent of said bankrupts; and Intervenor denies that said statement was untrue, but say that the said Newton & Co. delivered said notes and accounts to Intervenor as the proceeds of the sale of goods obtained under the contract of July 20, 1904, and said bankrupts and the Trustee in bankruptcy are estopped to deny the same.

239 3rd. Intervenor denies that said stipulation is not valid and binding and denies that it was beyond the power of the Receiver or Referee to make said stipulation and deny that said Receiver or Referee was misled therein by any word or act of Intervenor; and Intervenor says that it is clearly within the power and authority of said receiver and referee to make such stipulation, and that at the time the same was made it appeared, from all the facts and circumstances known to said receiver and referee and to Intervenor at the time, to be for the best interests of the estate; and is therefore valid and binding upon this court and its officers and the trustee of this estate.

4th. And Intervenor further says that said stipulation shows upon its face, and it is true that the same would not have been entered into by Intervenor, and possession surrendered by Intervenor of the goods, notes and accounts, unless the terms and conditions of said stipulation had been agree dto as stated and that in consideration of said stipulation being agreed to and by virtue thereof, this Intervenor surrendered to this court the goods, notes and accounts of which it was in peaceable possession under the delivery which had been made by Newton & Co., several days before the filing of the petition in bankruptcy, and was holding the same as the property of the Intervenor. That this court obtained possession thereof solely by virtue of said stipulation and no wholds the proceeds of said property, and the Intervenor

says that there has been no offer to return any part of said property or the proceeds thereof to this Intervenor, and that said stipulation cannot be set aside, cancelled or annulled without restoring or offering to restore Intervenor the possession obtained under it, or the proceeds of sale thereof.

5th. Intervenor denies that it's said contract of July 20, 1904, was not entered into in good faith and with the honest purpose and intention to retain title to the goods and their proceeds until paid for, and says that the sales made to Newton & Co. therein were conditioned sales, made in good faith under the terms and conditions in said contract expressed, and the same was so understood and acted upon by both parties to said contract; Intervenor denies that W. N. Moore, acting for Swofford Bros. Dry Goods Co., entered into said contract with the express understanding and agreement that said contract should not be admitted to record or its existence should not be divulged or made known to the creditors of Newton & Co., or that it should be held or kept as a secret and confidential contract for the protection and preference of Intervenor in the event of the insolvency of Newton & Co., or that said goods were to be intermingled, or that the same was intended as a secret lien or for the purpose of obtaining any unconscionable advantage over the creditors; or that it is against public policy or the
240 efficient operation of the bankrupt Act; or that said contract is a fraud or void against the creditors of Newton & Co. or this Trustee and Intervenor says that this Trustee is not of the class who can plead the matters and things set forth in this paragraph of his amended and substituted answer.

And Intervenor reiterating the pleas and matters, set forth in its reply to the original answer of the Trustee herein, prays as is prayed in its Intervention herein filed, for all proper relief.

SWOFFORD BROS. DRY GOODS CO.
By E. S. Ellis and

Webber & Webber, It's Attorneys.

Reply to amended and substituted answer of Trustee.

Filed this 1st day of Sept., 1905, at 5 P. M.

A. H. Sevier, Referee and Special Master.

241 I, John M. Somervell, Clerk of the District Court of the United States in and for the Texarkana Division of the Western District of Arkansas, do hereby certify that the foregoing 242 pages of this Transcript, contain a full and complete Transcript of the following record entries and files in the matter of the Estate of E. M. Newton & Co., on the Intervention of Swofford Bros. Dry Goods Company, in bankruptcy, to-wit: The original petition with schedules and exhibits, Order of References, Adjudication, Appointment of Receiver and Trustee with bond of Trustee, Petition of Swofford Bros. Dry Goods Co., Answer of Trustee to same, Reply of Intervenor to answer of Trustee, Amendment to answer of Trustee, Amended and substituted answer of Trustee, Objection of Intervenor to filing amended answer, Reply to answer of Trustee, Evidence taken before Special Master, Report of Special Master, Exceptions of Trustee to same, Exceptions of Intervenor to Master's Report, Opinion of the Court and order thereon, Record entries made by court, Petition for Appeal, Notice of application therefor, Assignment of Errors, Order allowing Appeal, Appeal Bond, Citation, Petition for Supersedeas, as the same appear on record and on file in my office.

In Testimony Whereof I hereunto set my hand, as said clerk, and affix the seal of said court, at Texarkana, Arkansas this 31st day of May, 1906.

Seal of the District Court West. Dist. of Ark. Texarkana Division.

JOHN M. SOMERVELL, Clerk.

Filed June 4, 1906. John D. Jordan, Clerk.

(*Appearance of Counsel for Appellant.*)

On the seventh day of June, A. D. 1906, the appearance of counsel for appellant was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2454.

SWOFFORD BROTHERS DRY GOODS CO., a Creditor and Intervener in the Matter of E. M. Newton & Co., Bankrupts, Appellant,
vs.
THAD A. BRYANT, Trustee in the Matter of E. M. Newton & Co., Bankrupts.

The Clerk will enter my appearance as Counsel for the Appellant.
EARNEST S. ELLIS,
Kansas City, Mo.,
T. E. WEBBER, AND
GEORGE WEBBER,
Texarkana, Ark.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2454. Swofford Brothers Dry Goods Co., etc., Appellant, *vs.* Thad A. Bryant, Trustee, &c. Appearance. Filed Jun. 7, 1906, John D. Jordan, Clerk. Earnest S. Ellis, T. E. Webber, George Webber, Counsel for Appellant.

(*Appearance of Mr. R. L. Searcy as Counsel for Appellee.*)

And on the first day of September, A. D. 1906, the appearance of Mr. R. L. Searcy, as counsel for appellee, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2454.

SWOFFORD BROTHERS DRY GOODS COMPANY, Appellant,
vs.
THAD A. BRYANT, Trustee, &c.

The Clerk will enter my appearance as Counsel for the Appellee.
R. L. SEARCY.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2454. Swofford Brothers Dry Goods Company, Appellant, *vs.* Thad A. Bryant, Trustee, &c. Appearance. Filed Sep. 1, 1906, John D. Jordan, Clerk. R. L. Searcy, Counsel for Appellee.

(*Appearance of Mr. William H. Arnold as Counsel for Appellee.*)

And on the third day of September, A. D. 1906, the appearance of Mr. William H. Arnold, as counsel for appellee, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2454.

SWOFFORD BROTHERS DRY GOODS COMPANY, Appellant,
vs.
THAD A. BRYANT, Trustee, &c.

The Clerk will enter my appearance as Counsel for the Appellee.
WILLIAM H. ARNOLD.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2454. Swofford Brothers Dry Goods Company, Appellant, *vs.* Thad A. Bryant, Trustee, &c. Appearance. Filed Sep. 3, 1906. John D. Jordan, Clerk. William H. Arnold, Counsel for Appellee.

(*Order of Submission.*)

And on the eighteenth day of December, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1906.

TUESDAY, *December* 18, 1906.

No. 2454.

SWOFFORD BROTHERS DRY GOODS CO., Etc., Appellant,
vs.
THAD A. BRYANT, Trustee, Etc.

Appeal from the District Court of the United States for the Western District of Arkansas.

This cause having been called for hearing in its regular order, the same was argued by Mr. Ernest S. Ellis in behalf of the appellant,

and counsel for the appellee not appearing to orally argue the same, the cause was thereupon taken as submitted to the Court upon the transcript of record from said District Court and the briefs of counsel for the respective parties filed herein.

(*Opinion.*)

And on the twenty-seventh day of April, A. D. 1907, an opinion by the United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1906.

No. 2454.

SWOFFORD BROTHERS DRY GOODS CO., a Creditor and Intervener in the Matter of E. M. Newton & Co., bankrupts, Appellant,

vs.

THAD A. BRYANT, Trustee in the Matter of E. M. Newton & Co., Bankrupts, Appellee.

Appeal from the District Court of the United States for the Western District of Arkansas.

Mr. Ernest S. Ellis (Messrs. Webber & Webber were with him on the brief) for the appellant.

Mr. R. L. Searcy and Mr. William H. Arnold filed a brief for the appellee.

Before Sanborn, Hook, and Adams, Circuit Judges.

Appeal by Swofford Brothers Dry Goods Company, a corporation, from an order denying its right to certain moneys and property in the hands of the trustee of E. M. Newton & Co., bankrupts.

HOOK, *Circuit Judge*, delivered the opinion of the court:

The appellant intervened in the bankruptcy proceedings claiming to be the owner of certain goods, notes and accounts under the terms of a written contract made with the bankrupts about a year before the proceedings were instituted. The contract provided, in substance, that appellant should sell goods to the bankrupts to be resold by them in the usual course of their business in Arkansas, but that the title to and right of possession of all goods delivered under the contract and of all proceeds of resales thereof, whether in cash, note or book account, should be vested and remain in appellant until the purchase price had been fully paid to it; that except for the right to resell the goods in the ordinary course of their business the bankrupts should

not remove them from the city in which they were doing business; also that they should keep the goods insured for the benefit of appellant. The contract was not recorded. Thereafter and at a time when the bankrupts were insolvent and appellant knew it they turned over to appellant the remainder of the goods then on hand and certain notes and accounts which were claimed to be proceeds of other goods obtained under the contract and resold by them to their customers. The notes were endorsed and the accounts assigned in writing to appellant. Three days afterwards voluntary proceedings in bankruptcy were commenced and an adjudication was made. A receiver was appointed who demanded possession of the property from appellant; the demand was refused. Subsequently, however, the goods, notes and accounts were delivered to the receiver under a written stipulation made with the approval of the referee in bankruptcy that the appellant should not be prejudiced thereby; that while the property might be converted into cash the proceeds should be held to abide the final determination of the controversy as to the ownership. The receiver succeeded himself as trustee. The goods were sold and part of the notes and accounts were collected by him. By its intervention the appellant sought the proceeds of the sale and the collections and such of the notes and accounts as remained on hand. On final hearing the district court held that the contract under which appellant sold the goods to the bankrupts was in effect a chattel mortgage and not a contract of conditional sale, that it contemplated that the bankrupts as mortgagors should retain possession of the goods with authority to resell them in the usual course of their business and without obligation to pay over the proceeds to the appellant, and that it was therefore fraudulent and void under the doctrine of Twyne's case obtaining in Arkansas.

The case must be considered upon the assumption that the goods which were returned to the appellant three days before the commencement of the bankruptcy proceedings were part of the identical goods originally sold by it to the bankrupts under the contract, and also that the notes and accounts were proceeds of like goods. When the bankruptcy proceedings were commenced the appellant was in the possession of the goods, notes and accounts and claimed them adversely to the receiver. It refused to surrender them until a stipulation recognizing the verity of the facts as claimed by it to exist was made with the approval of the referee. Upon the faith of that stipulation the court of bankruptcy acquired possession. By voluntarily yielding possession of property which was to be the subject of litigation the appellant parted with an advantage well recognized in the law; and the agreement that its rights should not be prejudiced thereby and that the facts existed upon which its claim of title was predicated should not be permitted to be repudiated especially since it received the solemn sanction of the court of bankruptcy and since the trustee whose present possession depends upon the act of the receiver holds fast to the advantage secured. There was no fraud practiced by the appellant in securing

the stipulation and the fact that the receiver and referee may possibly have acted improvidently affords no sufficient cause for ignoring its terms. Therefore, the only questions that are open are those which arise from the face of the original contract, the failure to record it and the fact that the appellant secured possession of the property on the eve of the proceedings in bankruptcy with knowledge of the insolvent condition of the bankrupts.

We are not able to assent to the contention that the contract authorized the bankrupts to resell the goods in the usual course of their business without obligation to pay the proceeds to appellant. The appellant expressly reserved the title to the proceeds in whatever form they might be and the right to take possession of the notes and accounts arising from resales and collect them for itself. From these provisions an obligation of the bankrupts to account for and pay over such proceeds as they collected is plainly implied and if it was not fulfilled there would be a breach of contract as much as if a mortgagor of chattels without power of sale should nevertheless dispose of the mortgaged property and appropriate the proceeds to his own use.

Whether the contract under which appellant claims is one of conditional sale or is a chattel mortgage, and as between the parties thereto whether it is valid and what the effect of the failure to record it may be are questions to be determined exclusively by the local law. (*Thompson v. Fairbanks*, 196 U. S. 516; *Humphrey v. Tatman*, 198 U. S. 91; *York Mfg. Co. v. Cassell*, 201 U. S. 344.)

Whatever may be the law in some jurisdictions it is authoritatively settled in Arkansas that a contract of conditional sale is valid notwithstanding it contains a provision that the vendee may sell the property in the usual course of his business.

Triplett v. Implement Co., 68 Ark. 230, 57 S. W. 261, involved a contract of that character and the conditional vendor was allowed to recover the goods from the vendee's assignee in insolvency who had taken possession of them. The court cited with approval *Perkins v. Mettler*, 126 Cal. 100, 58 Pac. 384; *Dewes Brewing Co. v. Merritt*, 82 Mich. 198, 46 N. W. 379 and *Baring v. Galpin*, 57 Conn. 352, 18 Atl. 266. In one of these cases the contract of conditional sale of a stock of merchandise expressly provided that the vendee might resell in the usual course of business and in the other two cases resales by the conditional vendees were held to have been in contemplation. In all of them the contracts were sustained as contracts of conditional sale. The contract involved in the Arkansas case provided that the title of the vendor should extend not only to the property but also to the proceeds of sales thereof made by the vendee. It is true that in this connection the court observed that if the goods were sold by the vendee they were to be sold as the property of the vendor, but we are unable to perceive how this difference is of importance in considering the peculiar circumstances of this case. If a conditional vendee sells the goods and mingles the proceeds with proceeds of his own goods so that they become indistinguishable the vendor may lose title, but the case before us presents no such difficulty. It was expressly agreed in

the stipulation that the notes and accounts involved here were the proceeds of goods delivered to the bankrupts under the contract of conditional sale and that agreement obviates all difficulties in tracing title. Observing the terms of the stipulation there was no admixture of the proceeds of sales by the bankrupts with the proceeds of other goods. It was as though no other goods had been sold or as though the sales had been made in the name of the appellant and the notes and accounts taken accordingly. Therefore, under the stipulation and the rule of *Triplett v. Implement Co.*, it must be held that as between the appellant and the bankrupts the former was the owner of the goods, notes and accounts in controversy. And further that under the doctrine obtaining in Arkansas it would have remained such owner even had an assignee in insolvency of the vendee first secured possession of them. There is no law in Arkansas requiring a contract of conditional sale to be filed or recorded in any public office.

Notwithstanding the views which this and other courts have at times entertained as to the effect of an adjudication in bankruptcy and the right and title of the trustee resulting therefrom it has been definitely settled by the Supreme Court that the trustee is vested with no better right or title than belonged to the bankrupt; that he stands simply in the shoes of the bankrupt and as between them he has no greater right. *York Mfg. Co., v. Cassell, supra.* The right of appellant in this case did not first come into existence when it took possession of the property in controversy on the eve of the bankruptcy proceedings. On the contrary it was secured by the contract which was executed almost a year before and it is that date which we must regard rather than the date when possession was taken. The order of the District Court must therefore be reversed and the cause remanded for further proceedings in conformity with this opinion.

Filed April 27, 1907.

(*Order Denying Petition for Rehearing; Vacating Decree of April 27, 1907, and Directing the Entry of a New Decree, etc.*)

And on the seventeenth day of June, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition for a rehearing, vacating the decree of April 27, 1907, and directing the entry of a new decree, etc., in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1907.

MONDAY, JUNE 17, 1907.

No. 2454.

SWOFFORD BROTHERS DRY GOODS COMPANY, ETC., Appellant,
vs.
THAD A. BRYANT, Trustee, etc.

Appeal from the District Court of the United States for the Western District of Arkansas.

This cause came on to be heard upon the petition for a rehearing, filed by Counsel for Appellee.

On Consideration Whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

It is further ordered and adjudged by this Court that the decree entered in this cause on the 27th day of April, 1907, be, and the same is hereby vacated, set aside and held for naught, and in pursuance of the supplement to the motion for rehearing filed by counsel for appellee, that a decree be now entered in this case, reversing the decree of the said District Court with costs and remanding the cause to that Court with directions to enter a decree that the Trustee in Bankruptcy pay to the intervener, Swofford Brothers Dry Goods Company, the following sums of money in full without deduction: $3135.00 the proceeds of the goods in controversy; the further sum of $2250.00 the collections of notes and accounts in controversy made by the trustee prior to the hearing before the referee; also all such other sums as may have been collected by the trustee from the notes and accounts since that hearing; and that he surrender to the intervener such of said notes and accounts as remain uncollected, and that he pay the costs of this suit and of this appeal.

JUNE 17, 1907.

(*Findings of Fact and Conclusions of Law by U. S. Circuit Court of Appeals.*)

And on the seventeenth day of June, A. D. 1907, a findings of fact and conclusions of law by the United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2454.

SWOFFORD BROS. DRY GOODS COMPANY, Appellant,

vs.

THAD. A. BRYANT, Trustee in the Matter of E. M. Newton & Co., Bankrupts, Appellees.

Under consideration of the record in the above entitled cause the Circuit Court of Appeals of the Eighth Circuit makes the following findings of fact and conclusions of law:

1. On July 20, 1904, Ernest M. Newton and John F. Newton, partners as E. M. Newton & Co., merchants at wholesale and retail in Arkansas, and Swofford Bros. Dry Goods Co., a corporation, of Kansas City, Missouri, engaged in the wholesale dry goods business, entered into a written contract as follows:

Know All Men By These Presents: That Mr. E. M. Newton & Co., of New Lewisville, Lafayette County, Arkansas, a co-partnership composed of E. M. Newton and J. F. Newton, party of the first part, has this day purchased from Swofford Bros. Dry Goods Co., and said Swofford Bros. Dry Goods Co., party of the second part, has sold to said E. M. Newton & Co. certain goods upon the following expressed conditions:

1. Said goods shall be selected by said first party from sample or from stock of said second party at Kansas City, Missouri, and same shall be shipped to said first party upon their request to New Lewisville, Arkansas, from which place they shall not be removed without the written consent of said second party save and except, that said first party shall have the right to sell said goods in the ordinary course of business but not otherwise.

2. Said second party shall prepare at time of shipment full and complete invoices of the goods so sold and selected and shall deliver copies of said invoices by mail or otherwise to said first party. Such invoices shall consist of itemized list of the articles so sold and shipped with the price and value of each article, and shall show also the credit terms upon which the same are sold and the rate of discount, if any, which is to be allowed upon payment of the purchase price in cash upon delivery or at an earlier date than that specified in said credit terms.

3. The title to and right to immediate possession of all the goods so sold and shipped by said Swofford Bros. Dry Goods Co. and of the proceeds derived from the sale of the same by the first party, whether in cash or note or book account, shall be vested and remain in said Swofford Bros. Dry Goods Co. until the full purchase price and the agreed value of the same shall be paid by said E. M. Newton & Co. to said Swofford Bros. Dry Goods Co. in cash; and any and all notes, checks and accepted drafts shall not be considered as pay-

ment, but merely as evidence of indebtedness. And upon taking possession of any notes and book accounts derived by said first party from the sale of said goods or any part thereof, said Swofford Bros. Dry Goods Company shall have the right to collect the same either in its name or in the name of E. M. Newton & Co. by suit or otherwise, and in case of disputed notes and accounts against persons of doubtful solvency, said second party may compromise and settle the same or may extend the time of payment thereof in such manner and upon such terms as may to it seem advantageous and any new notes taken thereafter whether in the name of Mr. E. M. Newton & Co. or in the name of said Swofford Bros. Dry Goods Co. shall be held and considered in all respects the same as the original evidence of indebtedness.

4. This contract and the terms thereof shall apply to all future orders given by the E. M. Newton & Co. and to all future sales and shipments made to them by said Swofford Bros. Dry Goods Co. so long as any part or portion of the purchase price of the goods sold and delivered hereunder shall remain unpaid, said Swofford Bros. Dry Goods Co. shall have the right to terminate this contract at any time, and said E. M. Newton & Co. may terminate the same at any time by paying in full in cash whatever balance of the purchase price of the goods purchased and shipped shall then remain unpaid. Delivery of the goods properly packed and marked to a common carrier at Kansas City, Mo., consigned to the first party as above specified shall be deemed and considered a full and complete delivery thereof by said second party and all freight and transportation charges shall be paid by said consignees. The acceptance of goods subsequently sold and shipped by the first party and the placing of the same in their stores and *m*arehouses at New Lewisville, Ark., or elsewhere, shall be held and considered sufficient to bring such goods within and under the terms hereof, shall be mentioned or referred to in the order so given or in the invoices given and delivered with each invoice.

Said first party shall keep all goods purchased hereunder properly insured at their expense for the benefit of second party; but the loss or destruction of such goods by fire or otherwise, shall not cancel the indebtedness thereof but said first party shall still remain liable to second party for any part of the purchase price remaining unpaid.

In witness whereof the parties above named have hereunto placed their hands and seals in duplicate this 20th day of July, 1905.

E. M. NEWTON & CO.
SWOFFORD BROS. DRY GOODS CO.,
Signed by WM. MOORE, *Sec.*

2. The contract was not filed or recorded.

3. Pursuant to the contract and prior to June 30, 1905, the Dry Goods Co. delivered to the Newtons goods of the value of $15,369.57. The latter paid on account thereof the sum of $2059.01. On June 30, 1905, the unpaid balance was $13,310.56.

4. The goods delivered under the contract were placed by the Newtons in their stock with other goods obtained from other parties, but they were of such character and contained such markes as rendered them capable of being identified and separated. It was contemplated by the parties that the Newtons might sell the goods so delivered in the usual course of their business. The Newtons did not keep separate accounts of their resales of the goods nor did the Dry Goods Company require them to make reports thereof.

5. On June 30, 1905, when the Newtons were insolvent and the Dry Goods Company knew it, they surrendered to the Dry Goods Company as belonging to it under the provisions of the contract goods of the value of $5337.21, notes to the amount of $1684.32 and customers' accounts to the amount of $8277.04. The goods were so surrendered by the Newtons as being the unsold part of those delivered under the contract and the notes and accounts as representing proceeds of their sales of like goods. Actual possession was taken by the Dry Goods Company.

6. In fact the goods surrendered to the Dry Goods Company were with slight exception goods that had been delivered under the contract, but only about ½ in amount of the notes and accounts surrendered represented proceeds of other goods delivered under the contract.

7. On July 3, 1905, three days after the surrender of the property as above mentioned, the Newtons filed their voluntary petition in bankruptcy, were adjudged bankrupts, and Thad. A. Bryant was appointed receiver. In one of the schedules attached to the verified petition in bankruptcy the Dry Goods Company was listed as a secured creditor with a statement of the facts upon which its rights were based, and recitals of the surrender to it of the goods, notes and accounts, that the notes and accounts were proceeds of the goods furnished by the Dry Goods Company under the contract and resold by the Newtons to their customers, and that the goods, notes and accounts were then in the possession of that company.

8. After the appointment of the receiver in the bankruptcy proceeding he demanded from the Dry Goods Company possession of the goods, notes and accounts mentioned. The demand was refused, but afterwards the Dry Goods Company surrendered them to the receiver under a written stipulation that they might be disposed of by him in connection with the sale of the other property in his hands, but that the Dry Goods Company should not be prejudiced thereby and that the proceeds should be held in lieu of the property so surrendered to abide the final determination of a court of competent jurisdiction as to the ownership thereof, and if the Dry

Goods Company prevailed it should have the proceeds free of fees, charges and expenses. As one of the conditions upon which it was made it was expressly admitted in this stipulation that the goods, notes and accounts in controversy were then in the actual, exclusive and adverse possession of the Dry Goods Company, that the goods were part of those delivered to the Newtons under the contract of July 20, 1904, and that the notes and accounts were proceeds of other goods delivered under that contract. This stipulation was made subject to the approval of the referee in bankruptcy. It was executed by the Dry Goods Company and the receiver, and the referee duly endorsed his approval thereon. Upon the faith thereof the goods, notes and accounts were then surrendered to the receiver. No fraud or deception was practiced by the Dry Goods Company upon the referee or the receiver in connection with the making of this stipulation.

9. Thad. A. Bryant who had been appointed receiver was duly selected as trustee. He sold the goods in controversy for $3135.00. The notes and accounts were not sold but at the time of the hearing of this matter before the referee he had collected $2250.00 on account thereof and still retained in his hands those that were uncollected. He has kept a separate account of these funds and held sufficient funds to answer the result of the litigation.

10. The Dry Goods Company thereupon presented its intervening petition seeking the payment to it of the sums realized as mentioned in the preceding finding and the restitution to it of the uncollected notes and accounts. The controversy in the cause was presented by the intervening petition, the trustee's answer thereto and the reply of the Dry Goods Company.

Conclusions of Law.

1. The contract of July 20, 1904, is a contract of conditional sale and not of mortgage, and as such was not required by the laws of Arkansas to be filed or recorded.

2. Under the laws of Arkansas the contract was valid as between the parties thereto notwithstanding the fact that it authorized the vendees to resell the goods delivered thereunder.

3. It was also valid as between the parties thereto not only in respect of such of the goods delivered thereunder as remained unsold when the vendor demanded and secured possession from the vendees but also in respect of the notes and accounts which represented proceeds of like goods resold by the vendee to their customers and which could be so identified and segregated.

4. The contract being valid under the local law as between the parties thereto the trustee in bankruptcy of the vendees cannot avoid or defeat the title of the vendor who took possession prior to the institution of the proceedings in which the vendees were adjudged to be bankrupts. The trustee has no greater right or title than the bankrupts.

5. Inasmuch as the bankruptcy court obtained from the vendor possession of the notes and accounts in controversy upon the faith of a stipulation made with its approval and without practice of fraud or deceit that such notes and accounts were the proceeds of goods covered by the contract of conditional sale, and still holds to such possession, the trustee is estopped from disputing the fact stipulated.

6. Swofford Bros. Dry Goods Company, the vendor, is entitled to a decree that the trustee in bankruptcy pay to it the sum of $3135.00, the proceeds of the goods in controversy, and the further sum of $2250.00, the collections of notes and accounts in controversy made by the trustee prior to the hearing before the referee, and also for such collections as may have been made since that time and for the surrender of such of said notes and accounts as remain uncollected and for costs. The sums mentioned should be paid in full.

June 17, 1907.

WALTER H. SANBORN,
WILLIAM C. HOOK,
ELMER B. ADAMS,
Circuit Judges.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. May Term, 1907. No. 2454. Swofford Bros. Dry Goods Co., Appellant, *vs.* Thad A. Bryant, Trustee, etc. Findings of Fact and Conclusions of Law by U. S. Circuit Court of Appeals. Filed Jun. 17, 1907, John D. Jordan, Clerk.

(*Decree.*)

And on the seventeenth day of June, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1907.

MONDAY *June* 17, 1907.

No. 2454.

SWOFFORD BROTHERS DRY GOODS CO., a Creditor and Intervener in the Matter of E. M. Newton and Co., Bankrupts, Appellant,

vs.

THAD A. BRYANT, Trustee in the Matter of E. M. Newton and Co., Bankrupts.

Appeal from the District Court of the United States for the Western District of Arkansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that Swofford Brothers Dry Goods Co., a creditor and intervener in the Matter of E. M. Newton and Co., Bankrupts, have and recover against Thad A. Bryant, Trustee in the Matter of E. M. Newton and Co., Bankrupts, the sum of Two Hundred Fifty-Eight and 70/100 Dollars for its costs in this behalf expended, and that the same be paid by said Trustee out of any funds in his hands as a part of the cost of administration of said Bankrupt's estate.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a decree that the Trustee in Bankruptcy pay to the intervener, Swofford Brothers Dry Goods Company, the following sums of money in full without deduction: $3135.00 the proceeds of the goods in controversy; the further sum of $2250.00 the collections of notes and accounts in controversy made by the trustee prior to the hearing before the referee; also all such other sums as may have been collected by the trustee from the notes and accounts since that hearing; and that he surrender to the intervener such of said notes and accounts as remain uncollected, and that he pay the costs of this suit and of this appeal.

June 17, 1907.

(Petition of Trustee for Allowance of Appeal to the Supreme Court of the United States.)

And on the eighth day of July, A. D. 1907, a petition of the trustee for allowance of an appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for Eighth Circuit.

No. 2454.

SWOFFORD BROS. DRY GOODS COMPANY, Appellant,
vs.
THAD A. BRYANT, Trustee in the Matter of E. M. Newton & Co., Bankrupts, Appellee.

Petition for Appeal.

The above appellee, Thad A. Bryant, Trustee in the matter of E. M. Newton & Co., Bankrupts, respectfully shows that he is the duly elected and qualified trustee of the estate of E. M. Newton & Co., Bankrupts, and that the above entitled cause is a controversy arising in bankruptcy proceedings and involves the construction and inter-

pretation of the United States Bankrupt Act, being Chapter 541 of U. S. Statutes, Act of July 1, 1898 (30 Statutes 544) and of said Act as amended Feb. 5, 1903, and of the amendments thereto, and that the said cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit.

That a judgment was therein rendered on the 17th day of June, 1907, reversing the decree of the District Court of the United States for the Western District of Arkansas, Texarkana Division.

That the matter in controversy in said suit exceed- $3,000.00 besides costs, and that this cause is not one in which the United States Circuit Court of Appeals for the Eighth Circuit has final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellee prays that an appeal be allowed him in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said appellee may be reviewed and if error be found corrected according to the laws and customs of the United States.

WILLIAM H. ARNOLD,
Attorney for Appellee.

(Endorsed:) No. 2454. Swofford Bros. Dry Goods Company, Plaintiff *versus* Thad A. Bryant, Trustee in the Matter of E. M. Newton & Co., Bankrupts, Appellee. Petition for Appeal to Supreme Court of U. S. by Thad A. Bryant, Trustee, etc. Filed Jul. 8, 1907, John D. Jordan, Clerk. William H. Arnold, Attorney.

(Assignment of Errors by Trustee on Appeal to Supreme Court of the United States.)

And on the eighth day of July, A. D. 1907, an assignment of errors by the Trustee on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

SWOFFORD BROS. DRY GOODS COMPANY, Appellant,
vs.
THAD A. BRYANT, Trustee in the Matter of E. M. Newton & Co., Bankrupts, Appellee.

Assignment of Errors.

The appellee, Thad A. Bryant, Trustee in the matter of E. M. Newton & Co., bankrupts, in connection with his petition for appeal herein presents and files herewith his assignment of errors and says:

That in the record and proceedings herein there is manifest error and that the United States Circuit Court of Appeals for the Eighth Circuit, erred in the following respects:

1. In reversing the judgment of and directing the District Court to enter an order granting the intervention of Swofford Bros. Dry Goods Co. for the notes, accounts and proceeds of sale of goods involved in this controversy, when the effect of the conditional sale contract was a concealment of the true financial condition of E. M. Newton & Co. and a fraud upon the other creditors of said Newton & Co., who advanced credit upon the faith of their ownership of their stock of merchandise.

2. In sustaining the conditional sale contract because it is apparent that creditors made their advances upon the faith of the ownership by E. M. Newton & Co. of their stock of merchandise which they would not have done if they had known of said conditional sale contract.

3. In holding that "the only questions that are open for consideration in this case are those which arise from the face of the original contract, the failure to record it, and the fact that the appellant secured possession of the property on the eve of the proceedings in bankruptcy, with knowledge of the insolvent condition of the bankrupts," because the proof and findings of fact herein show that the accounts and notes turned over were not the avails of goods sold by Swofford Bros. Dry Goods Co., on the contrary they represented proceeds of general sales; that the course of dealings between the parties was inconsistent with the claim of ownership by Swofford Bros. Dry Goods Co. in that no separate accounts were kept and no reports of sales were required by Swofford Bros. Dry Goods Co. and the goods were handled and sold in the regular course of business as the property of E. M. Newton & Co.

4. In holding that the stipulation between Swofford Bros. Dry Goods Co. and T. A. Bryant as Receiver was conclusive upon the other creditors and the trustee in the recitals that the notes and accounts were proceeds of sales of goods purchased from Swofford Bros. Dry Goods Co., since the undisputed proof and findings of this court is that no separate accounts were kept and that the notes and accounts were not proceeds of goods sold to Newton & Co. by Swofford Bros. Dry Goods Co. and at the time said stipulation was made the creditors were not represented by any one and no creditor's claim had at that time been filed with the referee.

5. In its finding that there was no fraud on the part of Swofford Bros. Dry Goods Co. in making the stipulation with Thad A. Bryant as receiver when the undisputed evidence shows that the attorneys for Swofford Bros. Dry Goods Co. who wrote the stipulation and the petition in bankruptcy, knew that the notes and accounts turned over were of the general accounts of Newton & Co. and could not be the avails of goods sold by Swofford Bros. Dry Goods Co., and knew that the receiver and referee were both ignorant of the facts.

6. In not holding that the transfer of goods, notes and accounts by Newton & Co. to Swofford Bros. Dry Goods Co. three days before

filing the petition in bankruptcy, with full knowledge on the part of both parties that Newton & Co. were insolvent, was fraudulent and void under the bankrupt act.

7. In holding that the contract is a conditional sale contract and not a mortgage; that under the law of Arkansas said contract is valid between the parties notwithstanding the fact that it authorizes the vendees to sell the goods delivered thereunder; that the trustee had no greater right or title than the bankrupt; that said trusee is estopped from disputing the statements contained in the stipulation between receiver and the intervener, and in making each of the declarations of law Numbered from 1 to 6 inclusive.

8. In that said court of appeals by reversing the judgment of the district court committed other errors apparent upon an inspection of the record.

Wherefore the appellee prays that the said judgment and decree of the Circuit Court of Appeals may be reversed and that the appellee may have a decree in his favor and for other relief.

WILLIAM H. ARNOLD,
Attorneys for Appellee.

(Endorsed:) No. 2454. Swofford Bros. Dry Goods Company, Appellant *versus* Thad A. Bryant, Trustee in the Matter of E. M. Newton & Co., Bankrupts, Appellee Assignment of Errors by Trustee on appeal to Supreme Court of the U. S. Filed Jul. 8, 1907, John D. Jordan, Clerk. William H. Arnold, Attorney at Law, Texarkana, Ark.

(Order Allowing Appeal of Trustee to the Supreme Court of the United States.)

And on the tenth day of July, A. D. 1907, an order allowing an appeal of the trustee to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for Eighth Circuit.

No. 2454.

SWOFFORD BROS. DRY GOODS CO., Appellant,
vs.
THAD A. BRYANT, Trustee in the Matter of E. M. Newton & Co., Bankrupts, Appellee.

Order Allowing Appeal.

It is hereby ordered that the appeal of Thad A. Bryant, Trustee, etc., in the above entitled cause to the Supreme Court of the United States be, and it is hereby allowed as prayed.

July 10, 1907.

WALTER H. SANBORN,
United States Circuit Judge, Eighth Circuit.

(Endorsed:) No. 2454. Swofford Brothers Dry Goods Co., Appellant, *vs.* Thad A. Bryant, Trustee, etc., Order allowing appeal of Trustee to the Supreme Court of the United States. Filed Jul. 10, 1907, John D. Jordan, Clerk.

(Præcipe for Transmission of Record on Appeal by Trustee to the Supreme Court of the United States.)

And on the seventeenth day of July, A. D. 1907, a præcipe for the transmission of the record on appeal by the Trustee to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Supreme Court.

No. 2454.

THAD A. BRYANT, Trustee in the Matter of E. M. Newton & Co., Bankrupts, Appellant,

vs.

SWOFFORD BROS. DRY GOODS CO., Appellee.

Precipe for Transmission of Record.

To Hon. John D. Jordan, Clerk of United States Circuit Court of Appeals, Eighth Circuit:

You are requested to transmit to the Supreme Court of the United States the entire record in the case of Swofford Brothers Dry Goods Co., a creditor and Intervener in the matter of E. M. Newton & Co., Bankrupts, Appellant, *v.* Thad A. Bryant, Trustee In the matter of E. M. Newton & Co., Bankrupts, Appellee, No. 2454, upon which the United States Circuit Court of Appeals, Eighth Circuit acted in rendering the judgment of June 17, 1907, that is the petition in bankrupts, of E. M. Newton & Co., the exhibits thereto; all orders of the referee relating thereto; the bond of trustee; all the testimony taken at the hearing of the intervention of Swofford Bros.; report of the special master; exceptions to the findings of Special Master; as well as all pleadings and orders, etc., to be found in the printed record in said cause;

Also all pleadings, orders, etc., in the United States Circuit Court of Appeals as may be necessary to properly present said cause to the United States Supreme Court.

This July 15, 1907.

W. H. ARNOLD,
Per G. G. POPE,
Attorney for Appellant.

(Endorsed:) No. 2454. Thad A. Bryant, Trustee, Appellant *versus* Swofford Bros. Dry Goods Co., Appellee. Precipe for transmission of Record. Filed Jul. 17, 1907, John D. Jordan, Clerk. W. H. Arnold, Attorney.

(*Citation.*)

And on the seventeenth day of July, A. D. 1907, a citation on the appeal by the Trustee to the Supreme Court of the United States was filed in said cause, the original of which, with the acknowledgment of service endorsed thereon, is hereto attached and herewith returned:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2454.

SWOFFORD BROS. DRY GOODS CO., Appellant,
versus
THAD A. BRYANT, Trustee in the Matter of E. M. Newton & Co., Bankrupts, Appellee.

Citation.

UNITED STATES OF AMERICA, *Eighth Judicial Circuit, ss:*

To Swofford Bros. Dry Goods Co., Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia within thirty days from the date of this citation pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Thad A. Bryant, Trustee in the matter of E. M. Newton & Co., Bankrupts, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter H. Sanborn, Judge of the United States Circuit Court of Appeals for the Eighth Circuit this 10 day of July, 1907.

WALTER H. SANBORN,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Service of the within citation is hereby acknowledged and the appearance of this appellee is hereby entered.

WEBBER & WEBBER,
Attorney- for Swofford Bros. Dry Goods Company.
7/15/7.

[Endorsed:] No. 2454. Swofford Bros. Dry Goods Company, Appellant *versus* Thad A. Bryant, Trustee in the Matter of E. M. Newton & Co., Bankrupts, Appellee. Citation for Swofford Bros. Dry Goods Company. Filed Jul. 17 1907 John D. Jordan, clerk.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing two hundred fifteen pages contain, in accordance with the Præcipe of Counsel for Thad A. Bryant, Trustee, etc., full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said Circuit Court of Appeals, in a certain cause in said Court wherein Swofford Brothers Dry Goods Co., a creditor and intervener in the matter of E. M. Newton & Co., Bankrupts, was appellant and Thad A. Bryant, Trustee in the matter of E. M. Newton & Co., Bankrupts, was Appellee, No. 2454, May Term, 1907, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation, with the acknowledgment of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifth day of August, A. D. 1907.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 20,842. U. S. circuit court of appeals, 8th circuit. Term No. 439. Thad A. Bryant, trustee in the matter of E. M. Newton & Co., bankrupts, appellant, *vs.* Swofford Bros. Dry Goods Co. Filed September 3d, 1907. File No. 20,842.

Office Supreme Court, U. S.
FILED.
FEB 2 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

NO. 172.

THAD A. BRYANT, Trustee in the Matter of E. M. Newton & Co., Bankrupts,
Appellant,

vs.

SWOFFORD BROS. DRY GOODS CO.,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Appellant.

JAMES K. JONES,
WILLIAM H. ARNOLD,
Attorneys for Appellant.

J. D. MILANS & SONS, LAW PRINTERS, 515 E ST., N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 172.

THAD A. BRYANT, TRUSTEE IN THE MATTER OF E. M. NEWTON & CO., BANKRUPTS, APPELLANT,

vs

SWOFFORD BROS. DRY GOODS CO., APPELLEES

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

Statement of the Case.

E. M. Newton & Company, merchants, filed their voluntary petition in bankruptcy in the United States District Court for the Western District of Arkansas, Texarkana Division, July 3rd, 1905, and on the same day the clerk referred the petition to the referee in bankruptcy (R. 12),

and on said day the referee in bankruptcy adjudicated said petitioners bankrupt and appointed Thad A. Bryant receiver of the stock of merchandise and choses in action of said bankrupts (R. 13).

The controversy in this case arises upon the intervention of Swofford Bros. Dry Goods Co., claiming the title to merchandise invoicing $5,337.21, open accounts for goods sold by Newton & Co., to their customers, $8,-477.04, and notes $1,684.32, or rather the proceeds of said goods and choses in action now in the hands of the trustee in bankruptcy awaiting the final decision of this cause. Swofford Bros. Dry Goods Co. listed as a secured creditor (R. 3-4). There are unsecured creditors whose claims amount to about $15,000.00 (R. 6).

At the first meeting of creditors, July 13th, 1905, Thad A. Bryant was appointed trustee of the estate (R. 13).

Swofford Bros. Dry Goods Co. filed their intervention before the referee August 10th, 1905 (R. 177), claiming said goods and choses in action. Thereafter the referee acting as master heard the case and made a report of his findings in which he allowed the claim of the intervenors for all the goods and notes and one-half of the accounts (R. 146-152). Exceptions were filed to the report by the trustee (R. 153-5), and by the intervenors (R. 155-7), and the case was heard before the District Court and the findings of the master were set aside and judgment was rendered in favor of the trustee for all the property in controversy. (See opinion of the District Court, 157-161). On appeal to the United States Circuit Court of Appeals for the Eighth Circuit the judgment of the District Court was reversed and all the property, goods,

notes and accounts were adjudged to be the property of the intervenors. (See opinion of the Court of Appeals, R. 193-6, and final judgment of that court, R. 197.)

The findings of fact and conclusions of law are contained in R. 198-202.

The trustee in apt time filed his petition for appeal to the Supreme Court of the United States and his assignment of errors and the appeal were duly allowed (R. 204-6).

The Pleadings.

It is alleged in the intervention in substance that on July 20th, 1904, a contract was entered into between Swofford Bros. Dry Goods Co., of Kansas City, Mo., and Newton & Co., of New Lewisville, Arkansas, whereby the intervenors agreed to deliver to said Newton & Co., merchandise upon the condition that the title and right to possession should remain vested in the intervenors, and that the title and right to possession of all cash, notes and accounts received by said bankrupts as the proceeds derived from the sale of any merchandise so sold and delivered to them under said contract should remain vested in said intervenors until the purchase price and value of the merchandise should be fully paid; that at divers dates between July 20th, 1904, and the 1st of May, 1905, the intervenors sold to said bankrupts under the terms of said contract merchandise to the amount of $15,369.57, that the bankrupts had paid upon said debt $2,059.01, leaving balance due $13,210.56; that on June 30th, 1905, E. M. Newton & Co., turned over on demand and delivered to the intervenors all the merchandise then remaining in their possession which had been sold under said contract,

invoicing $5,337.21, indorsed over notes of the face value of $1,684.32, and assigned and delivered accounts of the face value of $8,277.04, same being the notes and accounts received by said bankrupts as the proceeds derived by them from the sales, in the ordinary course of business, of merchandise sold and delivered to them under said contract; that on the 3rd day of July, 1905, said bankrupts filed their voluntary petition in bankruptcy, were adjudged bankrupts on said day and Thad A. Bryant was appointed receiver, and he demanded of said intervenors said goods and choses in action, claiming to be entitled thereto by virtue of his appointment, but the intervenors declined to deliver possession on the ground that they owned said property; that thereafter on the 4th day of July 1905, a written agreement was entered into by and between said intervenors and said receiver, said receiver acting under the direction and with the approval of the referee in bankruptcy, wherein it was stipulated that said property should be delivered to said receiver (see Exhibit "C" to the intervention, R. 176) upon the conditions expressed in a contract signed by said receiver, and that after said contract was so made the goods were delivered to said receiver.

The prayer was that the goods and choses in action, or the proceeds thereof, be returned to said intervenors (R. 168-172). For the contract of July 20th, 1904, between the intervenors, see R. 173; and the contract between the receiver and said intervenors of July 4th, 1905, see R. 176-7. By this latter contract it was agreed that the receiver should take possession of said property and convert the same to cash under the direction of the bankrupt court and that the assets should be kept separate and apart from the other proceeds of the bankrupts until all

questions regarding the title of possession of same should be "finally settled and determined by a court of competent jurisdiction, whereupon, if determined in favor of Swofford Bros. Dry Goods Co., said amount is to be forthwith turned over to said Swofford Bros. Dry Goods Co., free and discharged of all fees and charges and expense of whatever kind or nature, and that funds derived from said notes and accounts should be held intact as a separate fund and stand in lieu of said property."

In the preamble of said contract (R. 176) it was admitted that the notes and accounts were "proceeds of merchandise sold and delivered by said Swofford Bros. Dry Goods Co., to said bankrupts under and by virtue of the contract aforesaid" (of July 20th, 1904); and that said property was surrendered under the admission in the said agreement.

As a matter of fact the notes and accounts were not proceeds of sale of goods sold by Swofford Bros. Dry Goods Co., to said bankrupts, but they represented the goods sold from the general stock of Newton & Co., which consisted of merchandise bought from various creditors as well as from Swofford Bros. Dry Goods Co. No separate account was kept by Newton & Co. At the time this agreement was made by the receiver no creditor had filed a claim against the estate of said bankrupts, there was no trustee and no one represented the creditors (R. 200. See findings of fact 4 and 6).

The receiver and referee in making said erroneous admission whereby it is sought to take from creditors the notes and accounts, amounting to about $10,000.00, relied upon a statement attached to the petition in bankruptcy as schedule "A," where the intervenor's claim is referred to as a secured one and the notes and accounts

are referred to as being "from the goods of the said Swofford Bros. Dry Goods Co., purchase under said contract" (of July 20th, 1904, R. 3-4), but said statement relied upon by the receiver and referee was dictated by one of the attorneys for the intervenor and written by another of its attorneys (R. 108-9, 113-4).

The defense of the trustee to this intervention is in substance: That the goods surrendered to the receiver had not all been purchased from the intervenors under said contract of July 20th, 1904, and that the notes and accounts did not represent the resale of the goods which had been received from said intervenor, but that said notes and accounts were proceeds of sale of general stock of Newton & Company (R. 178).

That the trustee and referee had both been deceived by Swofford Bros. Dry Goods Co., in the admission made by the receiver in the contract of July 4th, 1905, and that said admission was not binding upon the creditors of the estate, that no creditor was at the time represented, no claims had been filed, and that the trustee who had the right to contest the claim of the plaintiff was subsequently appointed, and that it was beyond the power of the receiver or referee to make an agreement of any kind whereby the assets of the bankrupts would be given away (R. 181).

That the contract of July 20th, 1904, was a secret lien made between said intervenors and Newton & Co., to be used only in the event of the insolvency of said Newton & Co., that it was to be kept secret so that it would not injure the credit of said Newton & Co., was against public policy, and a fraud upon the Bankrupt Act; that it was understood that the goods sold by the intervenors to Newton & Co. should be placed in and mixed with the

general stock of said Newton & Co., and that the same should be sold in the regular course of business without keeping a separate account, or record, of the same, or accounting for the sale of said goods in any way, and that the effect of said contract was to give Newton & Co. a false credit based upon the apparent ownership of said goods, and that said contract was intended to give the intervenor a preference over other creditors (R. 186).

The Findings of Fact by the United States Circuit Court of Appeals.

It appears that the Honorable Circuit Court of Appeals included in its findings the following:

The goods delivered under the contract were placed by the Newtons in their stock with other goods obtained from other parties, but they were of such character and contained such marks as rendered them capable of being identified and separated. It was contemplated by the parties that the Newtons might sell the goods so delivered in the usual course of their business. *The Newtons did not keep separate accounts of their resales of the goods nor did the Dry Goods Company require them to make reports thereof.*

Newton & Company surrendered the goods, notes and accounts June 30th, 1905, and at that time they were insolvent, and Swofford Bros. Dry Goods Co. knew that they were insolvent;

That the goods surrendered *with slight exceptions* had been delivered under the contract, but only *about one-half* in amount of the notes and accounts surrendered represented proceeds of other goods delivered under the contract;

That on July 3rd, 1905, three days after the surrender of the property, Newton & Co. filed their voluntary petition in bankruptcy, were adjudicated bankrupts and Thad A. Bryant was appointed receiver. In one of the schedules attached to the petition in bankruptcy Swofford Bros. Dry Goods Co. were listed as a secured creditor with a statement of facts upon which its rights were based and the recital of the surrender to it of the notes and accounts, that the notes and accounts were the proceeds of goods furnished by Swofford Bros. Dry Goods Co., under the contract;

That after the appointment of the receiver, Swofford Bros. Dry Goods Co. surrendered said goods, notes and accounts under the written stipulation hereinbefore mentioned, and that "no fraud or deception was practiced by Swofford Bros. Dry Goods Co. upon the referee or receiver in the making of this stipulation";

That the goods in controversy had sold for $3,135.00 and the trustee had collected $2,250.00 on the notes and accounts and still retained those uncollected (R. 198-201).

Conclusions of Law.

The contract of July 20th, 1904, is a contract of conditional sale and not of mortgage, and as such was not required by the laws of Arkansas to be filed or recorded.

Under the laws of Arkansas the contract was valid as between the parties thereto, notwithstanding the fact that it authorizes the vendees to resell the goods delivered thereunder.

It was also valid as between the parties thereto not only in respect of such of the goods delivered thereunder as remained unsold when the vendor demanded and secured possession from the vendees, but also in respect of the

notes and accounts which represented proceeds of like goods resold by the vendee to their customers and which could be so identified and segregated.

The contract being valid under the local law as between the parties thereto, the trustee in bankruptcy of the vendees cannot avoid or defeat the title of the vendor who took possession prior to the institution of the proceedings in which the vendees were adjudged to be bankrupts. The trustee has no greater right or title than the bankrupts.

Inasmuch as the bankruptcy court obtained from the vendor possession of the notes and accounts in controversy upon the faith of a stipulation made with its approval and without practice of fraud or deceit that such notes and accounts were the proceeds of goods covered by the contract of conditional sale, and still holds to such possession, the trustee is estopped from disputing the fact stipulated.

Swofford Bros. Dry Goods Co., the vendor, is entitled to a decree that the trustee in bankruptcy pay to it the sum of $3,135.00, the proceeds of the goods in controversy, and the further sum of $2,250.00, the collections of notes and accounts in controversy made by the trustee prior to the hearing before the referee, and also for such collections as may have been made since that time and for the surrender of such of said notes and accounts as remain uncollected and for costs. The sums mentioned should be paid in full (R. 201-202).

Assignment of Errors.

1. Error is assigned (see fourth assignment) because the Honorable Circuit Court of Appeals held that the trustee in bankruptcy is estopped from claiming the notes and

accounts in controversy (see fifth declaration of law, page 202) on account of the stipulation made between the receiver and Swofford Bros. Dry Goods Co., dated July 4th, 1905 (R. 176-7). Although the undisputed evidence shows that the notes and accounts did not represent wholly the proceeds of sales from goods purchased from Swofford Bros. Dry Goods Co., under the contract of July 20th, 1904. (See sixth finding of facts, R. 200.)

2. Error is also assigned because the Court found that under the laws of Arkansas the contract of July 20th, 1904, is valid; that the trustee had no greater right or title than the bankrupt; that said trustee is estopped from disputing the statement contained in the stipulation between the receiver and intervenor; and that the Court erred in each of the declarations of law hereinbefore copied.

Argument.

Two questions are presented in this appeal:

FIRST, did the receiver with the assent of the referee have authority to make the admission, so that it might not be questioned by the trustee, contained in the agreement of July 4th, 1905 (R. 176-7), that the notes and accounts turned over to the intervenor were proceeds of sales of goods purchased from Swofford Bros. Dry Goods Co., and

SECOND, was the contract, dated July 20th, 1904, entered into between E. M. Newton & Company, and Swofford Bros. Dry Goods Company, valid in view of the fact that it was not pursued or observed by either party from the time of its execution until June 30th, 1905, just before the voluntary petition in bankruptcy was filed.

I.

Under section 2 of the Bankrupt Act it is provided that the courts of bankruptcy are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, (3) to appoint receivers, or the marshals, upon application from parties in interest, in case the court shall find it *absolutely necessary for the preservation of the estate* to take charge of the property of bankrupts after the petition in bankruptcy has been filed and until it is dismissed, or the trustee is qualified; (5) to authorize the business of the bankrupts to be conducted for a limited period by receiver, the marshals, or trustees, if necessary, in the best interest of the estates.

The petition in bankruptcy in this case was voluntary, and the judge being absent from the district, under section 18-g, the case was referred to the referee. By section 38-a the referees are invested, *subject always to a review by the judge,* with certain powers, among which is "he may exercise the power of the judge for taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of the judge from the judicial district, or the division of the district, or his sickness, or inability to act.

In this case after the petition was referred to the referee by the clerk, July 3rd, 1905, on the same day he appointed Thad A. Bryant receiver, and he demanded of Swofford Bros. Dry Goods Co. the possession of the goods, notes and accounts which had been turned over to it, three days before the petition in bankruptcy was filed, and negotiations began between the receiver and

the said company which resulted in a stipulation whereby it was agreed that the receiver should take possession of said property, collect the notes and accounts and sell the goods and that the proceeds should be held in lieu of the property so surrendered, to abide the final determination of a court of competent jurisdiction as to the ownership thereof, and if the Dry Goods Company should prevail it should have the proceeds free of fees, charges and expenses, and it was further stipulated that the notes and accounts so surrendered were proceeds of goods which had been sold by Swofford Bros. Dry Goods Co., to Newton & Co., under its contract of July 20th, 1904.

The findings of the Court of Appeals are in line with the uncontradicted proof that no separate accounts were kept by Newton & Company of the goods purchased under said contract and that the notes and accounts turned over represented sales of the general stock in which the goods of Swofford Bros. Dry Goods Co. were mixed with the goods of like kind purchased from other creditors.

The stipulation making the admission was approved by the referee who relied upon a statment filed by the bankrupt, attached to the petition in bankruptcy.

No creditor was represented in these negotiations inasmuch as creditors at that time had not been notified of the filing of the voluntary petition.

It is our contention that the power of the receiver and of the referee are derived solely from the Bankrupt Act, and there is nothing in the Bankrupt Act which will authorize a receiver to enter into an agreed statement of facts pertaining to the case. Such action on the part of the receiver would seriously hamper the power and authority of the trustee in the administration of the estate.

Furthermore, it does not appear that there was any consideration for that part of the agreement. It would seem to be enough for the receiver, in taking charge of the property, to assume the responsibility of taking care of it and reducing it to cash, and turning it over to Swofford Bros. Dry Goods Co., in the event its intervention should be sustained, without going so far as to preclude creditors, when they should become parties to the proceedings, from inquiring into the merits of the case.

Under the decision of the Honorable Circuit Court of Appeals the action of the trustee in this case amounted to the surrender and giving away of notes and accounts aggregating about $10,000.00.

As soon as the trustee in bankruptcy was elected and the intervention of Swofford Bros. Dry Goods Co. was filed an investigation was made by the creditors through the trustee and it was discovered that Swofford Bros. Dry Goods Co. had no more claim on the notes and accounts than any other creditor, and it was so found by the master who heard the case. The District Court denied the intervention as to all the property claimed, but the Honorable Circuit Court of Appeals sustained the intervention, not only as to the goods, but as to the notes and accounts, holding that the stipulation of the receiver was binding on the estate. It is true that the same person who acted as receiver was appointed trustee, but it cannot be seen why this will alter the case. In each capacity his authority was prescribed and limited by statute.

In the opinion of the Honorable Circuit Court of Appeals it appears that the trustee cannot be heard to dispute the correctness of the stipulation so long as he holds possession as trustee of the notes and accounts. No opportunity has yet been given to the trustee to surrender

the possession, if a surrender is necessary, before this case may be heard upon its merits; but judgment was rendered in favor of the intervenor apparently on the ground that the trustee could not foresee that the decision of the District Court would be reversed. It seems, at least, that it would have been only fair to give the trustee an opportunity to hold the goods and lose the case, or surrender the goods with the right to test its merits in a court of competent jurisdiction.

While the receiver undoubtedly had the right and it was his duty to take charge of the bankrupt estate, we deny that he had authority, under the statute creating his office, to enter into any kind of an agreement which would in any manner affect, or give over to, a claimant the property of the bankrupt estate. The trustee is primarily the representative of the creditors and not the receiver. The receiver is non-partisan and he acts as an agent for the court in protecting the property against loss.

But the trustee is appointed to represent creditors.

By section 26 of the Bankrupt Act the trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate, and by section 27 he may compromise any controversy arising in the administration of an estate upon such terms as may be of the best interest for the estate.

But under General Order No. 33 (of the United States Supreme Court) a trustee is not authorized to have a controversy arbitrated without first filing a petition setting forth the facts.

Nor is a referee authorized to approve a compromise of any controversy without first giving ten days' notice to creditors as required by section 58 of the Bankrupt

Act. So, it would appear that even after creditors have become parties to the bankruptcy proceeding they are entitled to notice before a controversy involving their rights can be settled. In other words, the creditors are entitled to be heard.

Therefore the reason would appear much stronger why it should be held that the receiver has no authority, express or implied, to give away or surrender the rights of creditors, or agree that certain evidence may not be introduced in the trial of any controversy that might arise in the administration of the estate. In this case the proceedings between the trustee and intervenor seem to have been practically *ex parte*. The creditors were not yet parties to the proceedings and no one represented them, and as the intervenor had taken over the notes and accounts, it is quite evident that it must have known whether or not they were notes and accounts arising from the sales of Newton & Company's general stock of merchandise.

The referee and receiver were not in position to know.

When this case was heard before the Honorable District Court upon the exceptions of both parties to the report of the Master, the Court held that the intervention should be denied on the ground that the contract of July 20th, 1904, in view of the conduct of the parties to it, was a mortgage or secret lien which was a fraudulent conveyance and fraudulent preference under the Bankrupt Law, and that the trustee took title to the property under the Bankrupt Act. The Court did not pass upon the validity of the stipulation made between receiver and intervenor. But inasmuch as that officer, as well as the trustee, are officers of the Court, if said stipulation had been considered and had been found a barrier to granting relief to the trustee without first surrendering the goods

back to the intervenor, the Court would certainly have directed the trustee to do so in order that the rights of unsecured creditors might not be unduly sacrificed; and then the trustee could have brought suit against the intervenor and under the undisputed evidence would have been entitled to recover the notes and accounts in any court of competent jurisdiction.

The claim of the intervenor that it gave up a valuable privilege in making the voluntary surrender of the goods, notes and accounts in consideration of the stipulation of the receiver making the false admission, is rather imaginary, because a suit would have undoubtedly been successful under the undisputed facts (as found by the Circuit Court of Appeals) by a trustee of the bankrupt estate in any court of competent jurisdiction. But if it be true that the trustee should place the intervenor in *statu quo,* then certainly there can be no reason why the trustee should not be permitted to do so. The District Court undoubtedly would and should have done so if it had taken the same view as the Circuit Court of Appeals. Then why would it not have been more just for the Honorable Circuit Court of Appeals to have rendered a judgment placing the intervenor in possession of the disputed property, but reserving to the trustee the right to sue for it in another proceeding?

After the trustee was elected, as already shown, the creditors caused him to make a defense to the intervention of Swofford Bros. Dry Goods Co.

This the creditors had a right to do under number 21, section 6 of general orders in bankruptcy, either in the name of any creditor or in the name of the trustee, but they elected to make this contest through the trustee.

It was decided in the case of Chatfied *et al. vs.*

O'Dwyer, Circuit Court of Appeals, Eighth Circuit, 101 Fed. Rep., 799, that the trustee is the proper party to act for the creditors in appeals from the decision of the District Court, and that an appeal cannot be taken by an objecting creditor.

In the case of Booth *vs.* Clark, 17th Howard, 322, it appeared that a receiver was appointed by one of the Chancery Courts of New York, under a creditor's bill against Clark. Subsequently, he went into another State and took the benefit of the Bankrupt Law. Clark afterwards was awarded a sum of money for a claim arising anterior to either of the above proceedings and the contest arose in the Circuit Court of the United States for the District of Columbia between the receiver and the assignee in bankruptcy. The case reached the Supreme Court of the United States, where it was held that the title of the assignee in bankruptcy, although the receiver had been appointed by the State Court some time before the proceedings in bankruptcy began, was superior to the claim of the receiver; that a receiver is an officer of the Court which appoints him, but he cannot sue in a foreign jurisdiction for the property of the debtor. It was said by the Court in that case (page 331):

> "A receiver is an indifferent person between parties, appointed by the Court to receive the thing in question; where it does not seem reasonable to the Court that either party should do it; he is an officer of the Court; his appointment is provisional; he is appointed in behalf of all parties and not of the complainant or defendant only; he is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in *custodia legis* for whoever can make out a title to it. It is the Court itself which has the care of the property in dispute. The re-

ceiver is but the creature of the Court; he has no powers, except such as are conferred upon him by the order of his appointment and the practice of the Court."

But by section 70 of the Bankrupt Act the title of the bankrupt's property is vested in the trustee. If the title of Newton & Company to these notes, accounts and goods, to which the intervenor could not make claim, vested in the trustee, then it would seem that the receiver would be without power to make any contract whereby that title could be divested. In this case the stipulation, however, has been sustained by the Honorable Circuit Court of Appeals, and the direct effect of it was to divest the title of property from the trustee which it was intended by the Bankrupt Act should pass to him.

But the trustee has not in himself the right of unlimited disposition of the property of the bankrupt. He cannot compromise or arbitrate a controversy, except in a certain way prescribed by the statute and by the general orders in bankruptcy. Certain the receiver, who has not as much power as the trustee, should not, therefore, be allowed to make contracts or deals without any restriction whatever, whereby the property which belongs to the creditors would be wasted or given away.

In the case of Wallace *vs.* Loomis, 97 U. S., 146, it was held that an assignee in bankruptcy represented all creditors of every class, and the latter were bound by all legal proceedings carried on by him affecting his trust. .

In the case of Dudley *vs.* Easton, 104 U. S., 99, it was held that the assignee in bankruptcy represented the general or unsecured creditors; he is in no respect the agent or representative of secured creditors, who do not prove their claims.

In the case of Ray *vs.* Norsworthy, 23 Wallace, 128, it appeared that the assignee in bankruptcy attempted to sell some of the property in his hands free of liens, but no notice was given to the secured creditors whose rights were affected by the sale. The Court, in holding that the action of the Bankrupt Court, in authorizing the assignee to make the sale was invalid, said:

> "Concede to the fullest extent the powers of the Bankrupt Court to do everything specified in the Bankrupt Act, still it is clear that the mortgage and privilege of the petitioner could not be cancelled and displaced without notice nor without an opportunity to be heard, nor could the proceeds of the sale be adjudged to a junior mortgagee with or without notice, unless for some cause other than what is disclosed in the record. Peychaud *vs.* Bk., 21 La. Ann., 262. Notice in some form must be given in all cases, else the judgment, order or decree will not conclude the party whose rights of property would otherwise be divested by the proceeding. Wilson *vs.* Bell (The Lottawanna), 20 Wall., 201 (87 U. S. XXII., 259); Nations *vs.* Johnson, 24 How., 205 (65 U. S. XVI., 632); Harris *vs.* Hardeman, 14 How., 339; Borden *vs.* Fitch, 15 Johns, 141; Buchanan *vs.* Rucker, 9 East, 192.
>
> "No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence without the privilege of showing, if he can, that the pretext for doing it is unfounded. Every person, as this Court said in the case of The Mary, 9 Cranch, 144, may make himself a party to an admiralty proceeding and appeal from the sentence, but notice of the controversy is necessary in order to enable him to become a party. Web-

ster *vs.* Reid, 11 How., 460; Boswell *vs.* Otis, 9 How., 350; Oakley *vs.* Aspinwall, 4 N. Y., 515.

"Authorities to the same effect are very numerous, nor is there any well considered case which gives any support to the proposition that the judgment order, sentence or decree of a court disposing of property subject to conflicting claims will affect the rights of anyone not a party to the proceeding, and who was never in any way notified of the pendency of the proceeding. Weed *vs.* Weed, 25 Conn., 337; Means *vs.* Means, 42 Ill., 50; Hill *vs.* Hoover, 5 Wis., 386; Wallis *vs.* Thomas, 7th Ves., 292; Rockland Water Company *vs.* Pillsbury, 60 Me., 427; Lane *vs.* Wheless, 46 Miss., 666; Hetrick *vs.* Wilson, 12 O. St., 136; Vallejo *vs.* Green, 16 Cal., 160."

In the case of White *vs.* Schloerb, 178 U. S., 542, it is said that the referee in bankruptcy exercises much of the judicial authority of the Court of Bankruptcy.

Notwithstanding the referee has in certain matters the authority of a Court, still as the trustee is the representative of creditors their rights cannot be affected until the trustee is appointed. The proceedings filed prior to the appointment of a trustee, are only preliminary, for the purpose of taking charge of bankrupt's estate where it is absolutely necessary for its preservation, and then creditors are invited in for the purpose of appointing a trustee, settling disputes and distributing the property.

By section 38-a of the Bankrupt Act the referee is invested with some of the powers of the Court of Bankruptcy, but his decisions are always subject to review by the judge.

In this case as soon as the intervention was filed an answer was made by the creditors through the trustee

(see R. 181) raising the questions under discussion, and the intervention was denied by the Honorable District Court in toto, but on appeal a final judgment was rendered by the Circuit Court of Appeals, not only giving to the intervenor the merchandise which the Court found had been sold under the contract of July 20th, 1904, with slight exceptions (see finding 6, R. 200), but the notes and accounts to which it had no claim, on the ground of the action receiver had estopped the trustee to claim title.

We respectfully submit that the acts of the receiver, approved by the referee in the stipulation referred to, was without authority, express or implied, by the Bankrupt Act.

But if it should be held that the act of the receiver estops the creditors and trustee from recovering that part of the assets, the title of which is in the trustee, without first surrendering the property involved to the intervenor, the trustee prays for a reversal of the judgment of the Circuit Court of Appeals decreeing all said property to the intervenor and that such judgment be rendered as will give the trustee the right to turn over said property without prejudice to a suit which may be instituted by him for the recovery thereof or its value in another suit.

II.

We respectfully insist that the judgment of the Honorable District Court of the United States for the Western District of Arkansas, Texarkana Division, was correct in holding that the contract of July 20, 1904, was a mortgage or secret lien which was fraudulent as to creditors of Newton & Co.

It will be remembered that the merchandise was shipped from time to time between the execution of the contract of July 20, 1904, to June 30, 1905 (see statement of account, R. 136-7), and at no time were Newton & Co. required to account or remit for the sales of the goods so shipped, but said goods were mixed with goods of like character purchased from other creditors and no separate accounts were kept and it was difficult to ascertain positively from the conflicting evidence (R. 56) whether the goods which were turned over June 30, 1905, had been bought from Swofford Brothers. The finding of the Circuit Court of Appeals (see finding No. 6, R. 200) was that the goods surrendered were, *with slight exception,* goods that had been delivered under the contract. The intervenor ought not to recover if there be any doubt as to the identity of the goods or any part thereof.

The conduct of the parties was such as to lead any one to believe that it was not the purpose of Swofford Brothers to fall back upon the contract unless Newton & Co. should become insolvent. It appears from the testimony that Newton & Co. had been buying goods from Swofford Brothers for several years, and at the time this contract was made, they owed said company $5,000 (R. 33). And this debt was paid from the proceeds of the general stock before any payments were ever applied toward the goods which were shipped under the contract of July 20, 1904.

It would be impossible to say how much of the goods still remained on hand at the time of the transfer which had been bought of Swofford Brothers prior to said contract.

In the case of Herryford *vs.* Davis, 12 Otto, 235, it was held that:

> "A contract between a manufacturer of cars and a railroad company, by which the latter was bound to pay the price of certain cars delivered to it by the former, either by paying its notes or surrendering the property to be sold in order to make payment, is not a conditional sale, but a mortgage."

In that case Mr. Justice Strong, speaking for the Court, said:

> The plain purpose of this statute was to render secret liens upon personal property ineffectual as against purchasers or creditors. The property in this case was in the possession of the railroad company when the levy upon it was made, and the contract under which the company held it was not recorded.
>
> What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provision it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is sought for. The form of the instrument is of little account.

One of the reasons assigned by the Circuit Court of Appeals for reversing the judgment of the District Court is that said contract of July 20, 1904, was valid under the laws of the State of Arkansas as against the trustee in bankruptcy of Newton & Co. It will be seen that

Newton & Co. were permitted to treat the goods as their own and use them as they saw fit and were not required to make reports of sales.

If Newton & Co. had not become insolvent, this course of dealing would have continued without interruption indefinitely, but as soon as they became insolvent, then the contract which had been kept secret was brought into requisition. While the contract itself in terms reserved title to the proceeds of sales, the finding of the Court of Appeals shows that the contract was not lived up to by either party (see finding 4, R. 200). "The Newtons did not keep separate accounts of their resales of goods, nor did the Dry Goods Company require them to make reports thereof."

There are a number of decisions of the Supreme Court of Arkansas sustaining contracts wherein it is stipulated that the title of the property is to remain in the vendor until the price is paid, but these decisions are with reference to such things as machinery, farming implements, live stock, and where it is not agreed that the property shall be resold.

Gibson *vs.* Martin, 38 Ark., 207;
McIntosh & Beam *vs.* Hill, 47 Ark.,363;
Carroll *vs.* Wiggins, 30 Ark., 402;
Simpson *vs.* Shackerford, 49 Ark., 63;
McRea *vs.* Merrifield, 48 Ark., 160;
Cincinnati Safe Co. *vs.* Kelly, 54 Ark., 476;
Edgewood Distilling Co. *vs.* Shannon, 60 Ark., 133;
Dedman *vs.* Earle, 52 Ark., 164;
Ferguson *vs.* Hetherington, 39 Ark., 438;
Ames Iron Works *vs.* Rea, 56 Ark., 450;
Morris *vs.* Cohn, 55 Ark., 401;
Bank of Little Rock *vs.* Collins, 66 Ark., 240;
Faisst *vs.* Waldo, 57 Ark., 270.

The doctrine of these cases follow the decisions of the Supreme Court of the United States:

Sturm *vs.* Boker, 150 U. S., 312.

There is an obvious difference in reserving the title to implements, wagons, grist-mills, tools, etc., under such contracts, and gents' furnishing goods or general merchandise, where there can be no question of the identity of the wagons, machinery, etc., but there would always be a question with reference to the identity of general merchandise. The very nature of the goods themselves, added to the power of disposition as in the case at bar, without being required to keep them separate from other goods or the proceeds separate from the general stock, ought to bar a recovery in this case.

This difference is recognized by the Supreme Court of Arkansas:

Lund *vs.* Fletcher, 39 Ark., 334.

The case of Robinson *vs.* Elliott, 22 Wall., 513 (89 U. S.).

In that case a mortgage was given on a store of goods and it was duly recorded.

But there was a provision in the mortgage authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade and to use the money thus obtained to replenish his stock. It was held as a matter of law that the instrument was fraudulent as to the assignee in bankruptcy.

The Court, in passing upon the validity of this mortgage, says:

> "But there are features engrafted on this mortgage which are not only to the prejudice of cred-

itors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged. As long as the bank paper could be renewed Robinson consented to be bound, and in Mrs. Sloan's case it was not expected that debt would be paid at maturity, but that it would be renewed from time to time, as the parties might agree. It is very clear that the instrument was executed on the theory that the business could be carried on as formerly by the continued indorsement of Robinson, and that Mrs. Sloan was indifferent about prompt payment. The correctness of this theory is proved by the subsequent conduct of the parties, for the mortgagees remained in possession of the property, and bought and sold and traded in the manner of retail dry goods merchants, from July 7th, 1871, to August 7th, 1873. During this period of twenty-five months Robinson indorsed as usual, and Mrs. Sloan was content with the payment of a small portion of the principal of her debt. Instead of getting it renewed, as contemplated by the mortgage, she seems to have been willing to let it remain dishonored, and the fair inference from the averments of the bill is that Robinson would have continued to indorse, and Mrs. Sloan exhibit the same easy indifference on the subject of her indebtedness, if the death of Seth Coolidge

had not dissolved the firm and compelled an inventory and appraisement, showing the desperate condition of the mortgagors. It hardly need be said that a mortgage, which by its very terms, authorizes the parties to accomplish such objects is, to say the least of it, constructively fraudulent.

"Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit for what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary, this long continued possession and apparent ownership were well calculated to create confidence and disarm suspicion. But apart from this, security was not the leading object. If so, why does Mrs. Sloan's note remain overdue for twenty-one months, and why does Robinson continue to indorse? This conduct is the result of trust and confidence, which, as Lord Coke tells us, are ever found to constitute the apparel and cover of fraud.

"In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien.

"Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to

ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The views we have taken of this case harmonize with the English common law doctrine, and are sustained by a number of American decisions. In the American editor's note to Twyne's case, Smith, L. Cas., p. 52-n., 7th Am. ed., most of the cases in this country on the subject are collected and classified. See, also, Mittnacht *vs.* Kelly, 3 Keyes, 407; Yates *vs.* Olmstead, 65 Barb., 43; Barnet *vs.* Fergus, 51 Ill., 352; *In re* Manly, 2 Bond, 261; *In re* Kahley, 2 Biss., 383.

"It is contended by the appellants that the rulings of the *Indiana courts are in favor of the validity of this mcrtgage,* and the main case relied upon to support this position is Maple *vs.* Burnside, reported in 22 Ind., 139. The facts of this case are stated in the opinion of the Court in a way to render it difficult for any practitioner outside of the State to understand the application to them of the legal rules which are discussed; *but there is nothing to show that the mortgage there considered contained any provision permitting the mortgagor to remain in possession of the property and deal with it as his own,* nor does the judgment of the Court involve any such question. The case would seem to be chiefly valuable as an authoritative exposition of certain points of *nisi prius* practice. Although we have been unable to find any case from Indiana of similar facts with the one at bar, yet the decision in the Ins. Co. *vs.* Wilcoxson, 21 Ind., 355, would seem to imply that when such case did arise it would be decided in accordance with the views we have presented."

Is there any reason why the same principle should not apply to the same conditions, in the case at bar, although

the instrument was not acknowledged or recorded?

There are numerous decisions cited in the footnote to this case in L. C. P. Co., edition, Book 20, showing that a "chattel mortgage which by its condition permits the mortgagee to remain in possession of the property and to deal with it as his own, disposing of it by sale in the due course of trade is fraudulent in law as to the creditors of the person making the sale and as to subsequent purchasers, and is absolutely null and void as to them without reference to the *bona fides* of the mortgage debt or the intention of the mortgagor as to fraud if the power of *disposition does not appear upon the face of the mortgage, but it is so understood or agreed by the parties at the time the mortgage is executed it is equally void.*

See among other numerous authorities Lund *vs.* Fletcher, 39 Ark., 325.

The case of Means *vs.* Dowd, 128 U. S., 273, is where the same principle is applied to a general assignment for the benefit of creditors. The decision of Robinson *vs.* Elliott, *supra,* is quoted from at length.

In that case certain debtors made a general assignment of their property, but the instrument permitted the assignor to remain in the possession of the property and to continue to sell the goods and collect the debts, and collections to be used to replenish the stock, and also provided for a renewal of the debt. It was held that the instrument was fraudulent and void and that if the legal effect of the instrument be to delay creditors it is void. The Court also quoted with approval from the case of Griswold *vs.* Sheldon, 4 N. Y., 481, in which the Court decided that a mortgage which, besides permitting the mortgagor by its terms, to retain possession of the goods and conferred on him the power to sell and dispose of

the same by orders was fraudulent and void in law as to creditors. Also quoted with approval from the case of David *vs.* Ramson, 18 Ill., 396, wherein it was held that a mortgage was void upon the principles already mentioned, which permitted the mortgagor to keep possession of the goods and sell them in the usual course of trade.

In the case at bar the contract relied upon authorized Newton & Co. to sell the goods in the usual course of trade and the proceeds of sales were applied by Newton & Co. as they saw fit, and they did not account to Swofford Brothers for the sales. It may be remarked here that it was shown by the testimony on the part of the intervenor that at the time this contract was made Newton & Co. owed Swofford Brothers on goods sold previous to July 20, 1904, about $5,000, and that this amount was paid from the general stock of Newton & Co., between the date of July 20, 1904, and June 30, 1905 (R. 36, 98).

In the case of Blennerhassett *vs.* Sherman, Assignee, 105 U. S., 100, the Court said:

> "As long ago as the case of Hungerford *vs.* Earle, 2 Vern., 261, it was held that 'A deed not at first fraudulent may afterwards become so by being concealed or not pursued by which means creditors are drawn into lend their money.' This doctrine has been repeatedly reaffirmed. Chancellor Kent in Hildreth *vs.* Sands, 2 Johns. Ch., 35; Scivenor *vs.* Scivenor, 7 B. Mon., 374; Bank *vs.* Housman, 6 Page, 526.
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> "In Coates *vs.* Gerlach, 44 Pa., 43, a deed of land had been made, directly by a husband to his wife. The deed bore date March 23, 1857, but was not filed for record until December 2, 1857. On January 21, 1858, the husband, professing to

act for his wife, sold the land to a third party. The creditors of the husband attached the unpaid part of the purchase money in the hands of the vendees, and between them and the wife a contest arose on the question which had the better right to the proceeds of the sale. Touching this controversy, Mr. Justice Strong, delivering the opinion of the Court, said: 'There is another aspect of the case not at all favorable to the wife. It is that she withheld the deed of her husband from record until December 2, 1857. In asking that a deed void at law should be sustained in equity she is met with the fact that she asserted no right under it, in fact concealed its existence until after her husband had contracted the debts against which she now seeks to set it up. There appears to have been no abandonment of possession by the husband. Even if the deed was delivered on the day of its date, the supineness of the wife gave to the husband false credit, and equity will not aid her at the expense of those who have been misled by her laches.'

"So in Hilliard *vs.* Cagle, 46 Miss., 309, it was held that a deed of trust in the nature of a mortgage, valid on its face, and not made or received with any intent to defeat existing or future creditors, may, nevertheless, be held to be fraudulent and void as to all creditors, existing and future, by evidence *aliunde,* showing the conduct of the parties in their dealings in reference to the deed. The principal circumstance relied on in this case to avoid the deed was the fact that the grantor retained possession of the property and the deed was withheld from record, and the mortgagor was thereby enabled to contract debts upon the presumption that the property was unincumbered. The Court declared that 'The natural and logical effect of the agreement and assignment, and the

conduct of the parties thereto, was to mislead and deceive the public, and induce credit to be given to the mortgagor, which he could not have obtained if the truth had been known and, therefore, the whole scheme was fraudulent as to subsequent creditors, as much so as if it had been contrived from that motive and for that object.

"In the case of Gill *vs.* Griffith, 2 Md. Ch., 270, the Court decided that a party cannot be permitted to take a bill of sale or mortgage of chattels from another for his own security, leave the mortgagor in possession and ostensibly the owner, and at his request and to keep the public from a knowledge of its existence withhold it from record for an indefinite period, renewing it periodically, and then receive the benefit of it by placing the last renewal upon record, to the prejudice of others whom the possession and ostensible ownership of that very property by the mortgagor have induced to confide in him. The mortgage which was in controversy in this case was, therefore, declared void. Upon appeal, the Court of Appeals affirmed the decree for the reasons assigned by the Chancellor."

See also Second Nat'l Bank Leavenworth *vs.* Hunt, 11 Wallace, 391.

Trustee Acquired Title to Property in Controversy Under Section 70-A of the Bankrupt Act.

The case of Hewitt *vs.* Berlin Machine Works, 194 U.S., 296, is cited to sustain the opinion of the lower Court. In that case it appeared that the Berlin Machine Works sold certain machines to Kellogg on credit and reserved title to the property until they were paid for. Several months thereafter Kellogg was adjudicated a bankrupt

and the purchase price of the machines not having been paid, the machine company filed an intervention claiming the machines, and it was held that the sale was conditional. The machines were not sold to the purchaser with the expectation that they would be resold or that the purchaser would appropriate the proceeds to his own use.

As to the case of Thompson *vs.* Fairbanks, 196 U. S., 516, see the following quotation from Mr. Justice Peckham:

> "There is no pretense of any actual fraud being committed or contemplated by either party to the mortgage. Instead of taking possession at the time of the execution of the mortgage, the defendant had it recorded in the proper clerk's office, and the record stood as notice to all the world of the existence of the lien as it stood when the mortgage was executed, and that the defendant would have the right to take possession of property subsequently acquired, as provided for in the mortgage. The bankrupt was, therefore, not holding himself out as unconditional owner of the property, and there was no securing of credit by reason of his apparent unconditional ownership. The record gave notice that he was not such unconditional owner. There was no secret lien, and if defendant cannot secure the benefit of this mortgage, which he obtained in 1891, as prior to the title of the trustee for the benefit of the creditors, it must be because of some provision of the bankruptcy law, which we think the Court ought not to construe or endeavor to enforce beyond its fair meaning."

The case of York Manufacturing Co. *vs.* Arthur Cassell, 201 U. S., 344, is not in point. In that case, the

York Manufacturing Co. supplied machinery to the M Vernon Ice, Coal and Milling Co., under contract stipulating that the title to the machinery, apparatus or plant should remain in the York Manufacturing Co. until the purchase price was paid, which contract was not recorded as required by the laws of the State of Ohio, and the contract was sustained. It was not understood that the vendee should sell the property or that it should apply the proceeds thereof to its own use.

But the case at bar bears no resemblance on its face to the above cited cases.

It is more like the case of Security Warehousing Co. *vs.* Hand, 206 U. S., 415, in which Mr. Justice Peckham, speaking for the Court, said:

> "By section 70-a, the trustee in bankruptcy is vested by operation of law with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which prior to the filing of the petition, might have been levied upon and sold by judicial process against him; and by subdivision (e) of the same section the trustee in bankruptcy may avoid any transfer by the bankrupt of his property, which any creditor of the bankrupt might avoid, and may recover the property so transferred or its value. Here are special provisions placing the title to the property transferred by fraud or otherwise as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same.
>
> "The method taken to store the property was, as found by the District Court, a mere device or subterfuge to enable the bankrupt to hypothecate the receipts, and thus raise money upon secret liens on property in the possession of the pledgor and under its control, and such scheme, under the facts, and as carried out in this case, and with

> regard to the Wisconsin law, was a fraud in fact, and neither the receipts nor the so-called pledge could be asserted against any of the creditors."

In the case of Dudley *vs.* Easton, 104 U. S., 99, it was held that:

> "As to everything except fraudulent conveyances and fraudulent preferences under the bankrupt law, the assignee takes as a purchaser from the bankrupt with notice of all outstanding rights and equities."

If the transactions developed in this case are so unfair to other creditors as to amount to fraud upon their rights, then the trustee takes the title to the property in controversy.

We therefore respectfully insist that the Circuit Court of Appeals erred in its 4th declaration of law (R. 201) that the trustee had no greater right or title than the bankrupts.

Arkansas Decisions.

The decisions of the Supreme Court of Arkansas, under practically the same conditions as in the case at bar, show that the intervenors' contract is fraudulent in law and cannot be sustained.

In the case of Lund *vs.* Fletcher, 39 Ark., 335, it was said:

> "A majority of this Court approve the views of this question expressed by Chancellor Cooper, of Tennessee, in the case of Phelps *vs.* Murray, 2 Tenn. Ch., 746, considering them based on good reason and sound policy. And the Court concurs in adopting them for the decision of this case, and

> to settle the question in this State, for all cases presenting the same aspect. That eminent jurist, whose ability, judicial temperament and profound study entitle his opinions to the highest consideration, whilst conceding that a mortgage may be made to cover after-acquired property, and that there may be left in the mortgagor a limited power of disposition over specific articles, with a view to their replacement, such as tools, machinery, rolling stock, etc., denies that such power of disposition consists with a valid lien on personal goods, which can only be profitably used as articles of commerce. He says that such a fluctuating lien, opening to release what is sold, and to take in what may be purchased, is invalid in law, and not enforcible in equity."

In the case of Martin *vs.* Ogden, 41 Ark., 192, the Court held:

> "It was neither alleged nor proved to have been made with base motives, but may be held fraudulent if the facts justify the conclusion. It has many of the indications of fraud by presumption which existed in the well known Twynne's case. That presumption may grow, not alone from the face of the instrument, but from concurrent acts, surrounding circumstances and subsequent conduct of the parties to the instrument, reflecting light upon their original intention. The more modern and better doctrine is that this is a presumption of fact, and that no conclusive legal presumption arises from the fact that the vendor remained in possession, and that even such a presumption of fact does not necessarily arise where the possession accompanies or follows the deed, or where there is a mere mortgage. It is a question for the jury, or, in equity, for the chancellor, under all the circumstances.

"If the mortgage had been merely of articles, beneficial in the use, such as tools, agricultural implements, railroad equipments, horses, mules, etc., then it would be natural and proper that the owner should remain in possession and have that use, not only for his own convenience, but the better to enable him to pay the debt; and future acquisitions of such property may be brought within the mortgage, and provisions for their change and replacement as necessity or convenience may require, may be properly made.

"But drugs in stock are kept solely for merchandise, and have no other use than for sale, and disappear on selling. The parties would not have been allowed to provide that the mortgagor might remain in possession and dispose of drugs in the course of trade, without applying the proceeds to the debt, or in some way attaching them or their fruit, a continuing trust, and at the same time make continual additions to the stock, all to be protected by the mortgage against creditors. It is evident that one might continue business all his life that way, secretly investing all surplus profits for the benefit of himself and family, and always keeping enough stock to satisfy the demands of his trade with perfect impunity—that is, if his mortgagee were allowed thus to protect and shield him. It is no answer to say that by this course the mortgagee's security is diminished also. That would be his own business if true, but he would have no right at his own risk to enable his debtor to defraud everybody else. That would violate the maxim of *'sic utere tuo,'* etc. Besides it would be an easy matter to keep always in sight enough to satisfy the mortgage and not enough more to tempt other creditors to grasp after the surplus. According to ordinary human motives, a creditor thus favoring a debtor, might rely upon his complaisance to that extent.

> "Why should parties be allowed to do with impunity the very things which the law tells them they shall not agree to do? Yet it seems to us, that the able counsel for appellants are urging upon us that they must be; because, as they say, the mortgage contains no such stipulations and is not void upon its face, and that matters are not necessarily fraudulent when done, which the law would have held fraudulent in them to stipulate to do."

In the case of Fink *vs.* Ehrman Bros., 44 Ark., 310, it was held that a mortgage on merchandise was valid on its face but when the mortgagor retained possession, sales continued, and the stock replenished as before the mortgage, this is evidence of fraud against attaching creditors and conclusive if not explained.

> "Where there is an agreement or understanding between the mortgagor and mortgagee of a stock of goods that the mortgagor may remain in possession of the goods and sell them as his own, the mortgage is as fradulent and void as to other creditors as if the agreement were expressed in the mortgage; and to arrive at their true meaning, the concurrent acts, surrounding circumstances, and subsequent conduct of the parties are taken together for the consideration of the Court or jury trying the issue."

Case of Triplett vs. Mansur & Tebbets Implement Co., 68 Ark., 230.

The decision in this case was relied upon by the Circuit Court of Appeals as the basis for holding that the contract between the intervenor and the bankrupt under the laws of Arkansas is valid.

But we respectfully insist that said case has no application whatever to this controversy.

It appears from the facts in that case that Mansur & Tebbets Implement Co., of St. Louis, sold to H. C. McGaughy, of Pine Bluff, certain hardware, machinery, etc., under a contract in which it was stipulated that the title to and ownership of all goods which might be shipped during said season should remain in and their proceeds in case of sale should be the property of Mansur & Tebbets Implement Co. until full payment should be made therefor, and as shown on page 234 of the report, if the goods were sold by McGaughy, they were to be sold as the property of Mansur & Tebbets Implement Co. and the proceeds of sale were to be and remain the property of said company.

There was no question whatever as to whether or not creditors had been misled to their prejudice. If not distinctly shown, the inference is clear that McGaughy was to act as the agent for the implement company in making the sales and that he accounted for the proceeds of said sales. There is not the slightest reason to believe from the report of this case that the implements, machinery, etc., sold to McGaughy were mixed with implements, machinery, etc., of like kind bought from other creditors or that McGaughy failed to keep a separate account of sales of said implements, or remit for the same as required by his contract.

The case at bar distinctly presents the opposite state of facts; that is to say, the goods in question were mixed with those bought from other creditors, no separate account was kept of the goods or the proceeds, nor were Newton & Co. expected or required to account for the proceeds of sale. On the contrary, the proceeds of the

general stock, including the Swofford Brothers' goods, were used by Newton & Co. as they saw fit. As already shown, Swofford Brothers succeeded in collecting an old debt of $5,000 on account of general sales from the general stock.

Again the Circuit Court of Appeals contrasted the assignee under a general assignment for the benefit of creditors with the trustee in bankruptcy. There is no more similarity between the rights and powers of said assignee and the trustee than there is between the facts in the case at bar and the one under consideration.

The title of an assignee under a general assignment for the benefit of creditors under the laws of Arkansas fails whenever it is shown that there is fraud on the part of the assignor in making the assignment.

Section 338 of Kirby's Digest of the Statutes of Arkansas reads as follows:

> Any assignment for the benefit of creditors may be contested or attacked for fraud, by any creditor, and proof of fraud on part of the assignor shall be sufficient to invalidate the assignment, whether the assignee knew of it or not.

The following decisions also show that he has no title whatever that will be respected by the courts in case there is fraud in the deed of assignment:

Hill *vs.* Shrygley, 51 Ark., 59;
Probst & Hill *vs.* Welden, 46 Ark., 405;
Penzel Grocer Co. *vs.* Williams, 53 Ark., 81;
Lazarus *vs.* Camden National Bank, 64 Ark., 322.

On the other hand, under the bankrupt act the title of the trustee is made effectual to property which has been fraudulently transferred by the bankrupt.

The precise question involved in this case under exactly the same form of contract has not been presented to the Supreme Court of Arkansas. But the principles applicable thereto seem to be clearly established by the foregoing decisions.

Loving Pub. Co. *vs.* Johnson (Tex.), 4 S. W., 532, involved almost identically the same questions as in the case at bar. Willie, C. J., in passing upon the validity of such contracts, said:

> "The decision of the District Judge in this case is sought to be sustained upon the principles announced in Bank *vs.* Tufts, 63 Tex., 113; but the two cases are unlike each other in many important particulars. There the contract was made in reference to a specific article, and no power of sale was given to the vendee. Here the agreement was made in reference to a stock of goods consisting of a multitude of different articles, and they are to be sold in the usual course of trade. Not only so, but these goods are allowed to be replaced by others to be sold and others purchased, till there may not remain the smallest remnant of the original stock; and yet through all these mutations, the stock is to be protected against the creditors of the vendee. This arrangement, too, is secret; no record made of it, and no knowledge of its existence brought to the world. A better device for the perpetration of fraud upon the creditors of the vendee could hardly be invented. They are placed in a position where they can enjoy all the benefits of a merchant without being subject to any of the usual liabilities which may arise in the course of trade. They hold themselves out to the world as the owners of the goods, with every outward appearance of ownership, and may thereby obtain false credit. (Hilliard *vs.* Cagle,

46 Miss., 309.) They can sell the property as they see fit, devote a large portion of the proceeds to their own benefit, and set their creditors at defiance. They can hinder and delay these as long as they please and their confidential vendors may deem proper."

Decisions of the State of Tennessee.

As shown by the opinion in the case of Lund *vs.* Fletcher, 39 Ark., 334, the decision in the case of Phelps *vs.* Murray, 2 Tenn. Ch., 746, was adopted by the Arkansas Supreme Court in holding that a mortgage is fraudulent as to creditors where the mortgagor is given the power of disposition of personal goods which can only be profitably used as articles of commerce. Hence the following decisions of the Supreme Court of Tennessee which are in harmony with those of the Supreme Court of Arkansas may be profitably consulted:

In the case of Mayor *vs.* Catron, 48 S. W., 255, it appeared that:

> "A wholesaler at various times shipped goods to a retailer, the bills being marked 'Consigned; our property until paid for.' He knew that the latter mingled the goods with his regular stock and retailed them to customers. He placed no restrictions upon such sales, and required no reports of sales, and no account of sales was kept, but part of the goods were paid for out of the general proceeds."

The Court held that this contract was void as to the creditors of the vendee.

The Court fully recognized that it was the law of Tennessee that a party could make a valid contract for the

sale of personal property, under which the possession would pass to the purchaser and the title remain in the seller until the purchase money was paid, which is in line with the Arkansas decisions.

But the Court held that it was equally well settled that where a purchaser is put in possession of personalty by the owner and at the same time clothed with all the *indicia* of title and ownership, and is expected to sell the property, his vendee will get a good title.

See Wilder *vs.* Wilson, 16 La., 548.

The Court further continuing, said:

> "In the case at bar it is manifest that the complainant sold the goods to Collier & Fawkes, and later to Fawkes, with the intention, expectation and knowledge that they would sell them as their absolute property in their saloon business; and, this being so, it is very questionable whether this power given them, coupled with their relations and course of dealings with each other, is not wholly inconsistent with the retention of title in complainant, and renders void the condition. In the opinion of the writer, the retention of a secret lien and title to merchandise of the kind here involved, delivered to the purchaser to be daily sold at retail in his business, as the property of the purchaser, is contrary to a sound public policy, obnoxious to the purpose of our registration laws, and therefore void. Such a title should not be countenanced and enforced in contravention of the rights of third parties, and especially creditors of the party dealing with the goods, who is clothed with all the usual *indicia* of complete ownership. For the reasons stated we think the chancellor committed no error in this decree."

In the case of Arbuckle *vs.* Kirkpatrick (Tenn.), 39 S. W., 3:

> "A contract by which a manufacturer appointed a firm 'special selling factors' to handle his goods, under which all goods consigned were to remain the property of the consignor until sold at prices fixed by the consignor, the consignees to protect the consignor from any decline in the price, and to have the benefit of any advance, and which required the consignees to remit for all goods consigned at the end of 60 days, whether sold or not, or whether collected for or not, and did not require any report made as to sales, in so far as it affected the rights of third persons, is a contract of sale and not of agency."

The case of Star Clothing Manufacturing Co. *vs.* Nordeman, 100 S. W., 93, decided by the Supreme Court of Tennessee February, 1907, is almost identical with the case at bar. The S. Steinberg Dry Goods Co. ordered a bill of merchandise from the Star Clothing Manufacturing Co., of Tennessee, and said goods were shipped to Newport, Ark., under a contract that the title of said goods should not pass to the vendee until said goods were paid for in full.

Thereafter the vendee was adjudicated bankrupt, and the vendor, not having been paid any of the purchase price for the goods, demanded them of the trustee, who refused the demand and sold the goods; then suit was brought against the trustee to recover the proceeds in the State Court, no objection being raised as to the jurisdiction of the State Court in the premises. The goods consisted of shirts, overalls, etc.

The question presented was whether there could be a lawful conditional sale to a retail merchant for goods to

be resold in and for the purpose of and in the prosecution of his business, or was the retention of title consistent with the nature of a sale made under the circumstances stated.

The Court held that the trustee was entitled to the goods.

In the case of Coweta Fertilizer Co. *vs.* Brown, 163 Fed Rep., 162, the Circuit Court of Appeals of the Sixth Circuit, in passing upon a ontract arising under the laws of Tennessee, wherein it was attempted by the vendor, in the sale of fertilizer, to reserve the title until the price therefor should be fully paid, and when the fertilizer was to be resold at retail by the vendee in the ordinary course of business, it was held void and contrary to public policy.

Decisions of the Federal Courts.

This question is fully considered in a case of the Circuit Court of Appeals, Second Circuit, *In re* Garcewich, 115 Fed. Rep., 87, arising under the laws of New York, to which the attention of the Court is respectfully invited.

The Court, speaking through Circuit Judge Wallace, said:

> "It is the settled law of this State that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to

appear. But when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable, and the title to have been vested absolutely in the buyer.

"Luddon *vs.* Hazen, 30 Barb., 650;

"Frank *vs.* Batten, 49 Hun., 91, 1 N. Y. Supp., 705;

"Bonsteel *vs.* Flack, 41 Barb., 435.

"When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee. Even in the case of a chattel mortgage, when it is understood between the mortgagor and mortgagee that the mortgagor may sell the chattels in his business, and use the proceeds, the transaction is fraudulent in law as against the creditors of the mortgagor. Such an arrangement, if expressed in the instrument, defeats its essential nature and qualities as a mortgage, so that, in a legal sense, it is not a security, but merely an expression of the confidence by a mortgagor; and, if made, but not expressed in the instrument, is equally vicious, if not more suggestive of a fraudulent purpose."

The Court further said in that case:

"It is not the meaning of the present act that the institution of proceedings in bankruptcy should secure immunity to the title of fradulent vendors or mortgagors, and deprive creditors of a resort to property out of which, but for the proceedings,

> they could have satisfied their claims. Section 70 declares in express terms that the title of the bankrupt shall vest in the trustee to 'all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.' That language is sufficiently comprehensive to vest the trustee with title to all property of the bankrupt as against the fraudulent title of another."

The case *In re* Pekin Plow Company, 112 Fed. Rep., 308, decided by the Eighth Circuit Court of Appeals, on page 310, the Court quoted the following:

> "Section 67, subdivision 'a,' provides that: 'Claims which for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against the estate.' "

And said:

> "From the foregoing provisions of the act, it, in our opinion, clearly appears that the institution of proceedings in bankruptcy amounts to an effectual sequestation for the benefit of all his creditors of all the property of the bankrupt, including property transferred by the bankrupt, before proceedings were instituted, in fraud of his creditors."

And on page 311 the Court said:

> "This language is direct, clear, and free from all ambiguity, and seems to have been chosen by the lawmakers with special reference to statutes relating to fraudulent conveyances."

In re Frazer (Missouri case), 117 Fed. Rep., 747, at the bottom of the page, it is said:

> "That a trustee chosen under the Bankrupt Act of 1898 'becomes the representative of all the creditors, and is possessed of their rights to attack fraudulent conveyances';and that he becomes vested by operation of law of all the property which prior to the filing of the petition in bankruptcy the insolvent debtor could by any means have transferred, 'or which might have been levied upon and sold under judicial process against him.'"

In re Carpenter, 125 Fed. Rep., 831 (New York), the Court, in passing upon a contract very similar to the one at bar, held:

> "Goods purchased to be resold in due course of business cannot be claimed by the seller, as against the trustee of the bankrupt purchaser, where sold under a secret, unrecorded agreement that the title should not pass till payment was completed.
>
> "Under Bankrupt Act, July 1, 1898, c. 541, 70, 30 Stat., 565, vesting in a trustee in bankruptcy title to property transferred in fraud of creditors, an agreement by which title to goods sold to be put into the purchaser's common stock and resold in the due course of his business, and the title to the proceeds of such resales are to remain in the seller until all the purchaser's obligations, existing and future, are met, is invalid as a mortgage against such trustee.
>
> "A trustee in bankruptcy may take advantage of the invalidity of an agreement fraudulent as to the creditors of the bankrupt, the same as a judgment creditor might."

In re Howland, 109 Fed. Rep., 869 (N. Y.), it is held:

> "A reservation of title to merchandise by a seller until payment is made is void as against creditors of the purchaser, where the latter is, by the contract, given the right to sell the merchandise in the ordinary course of business; such right being inconsistent with the ownership of the seller, and one which would necessarily destroy his right of property."

Also consult the following authorities:

In re Benau, 118 Fed. Rep., 471;
In re Frazer, 117 Fed. Rep., 747;
Kellam *vs.* Brown, 112 N. C., 451; 17 S. E., 416;
Chickering *vs.* Bastress, 130 Ill., 206; 22 N. E., 542; 17 Am. St. Rep., 309;
Ex parte White, 6 Ch. App., 397;
Drew *vs.* Smith, 59 Me., 393;
Gross *vs.* Jordan, 83 Me., 380; 22 Atl., 250;
Cleveland McH. Works *vs.* Lang, 67 N. H., 348; 31 Atl., 20; 57 Am. Rep., 566;
Dixson *vs.* Blondin, 58 Vt., 689; 5 Atl., 514;
Marvin Safe Co. *vs.* Norton, 48 N. J. (19 Vroom) 410; 57 Am. Rep., 566;
Mershon *vs.* Moors, 76 Wis., 502; 45 N. H., 95;
Barrel *vs.* Kelley, 66 Vt., 515.

We therefore respectfully pray that the judgment of the Honorable Circuit Court of Appeals for the Eighth Circuit be reversed, and for other relief.

This December 23, 1908.

JAMES K. JONES,
WILLIAM H. ARNOLD,
Attorneys for Appellant.

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Office Supreme Court,
FILED.
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JAMES H. McKENN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

Number 172.

THAD A. BRYANT, TRUSTEE IN THE MATTER OF E. M. NEWTON & CO., BANKRUPTS, APPELLANT,

VS.

SWOFFORD BROS. DRY GOODS CO., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

This is an intervention by Swofford Bros. Dry Goods Company, asking that the proceeds of certain merchandise, notes and accounts now in the hands of Thad. A. Bryant, trustee of E. M. Newton & Company, bankrupts (and held by him, *pendente lite*, under the terms of a stipulation), be turned over to intervener as its property.

STATEMENT OF FACTS.

Prior to the 30th day of June, 1905, E. M. Newton & Company were in business as merchants. For several years they were located at New Louisville, Arkansas, but later moved to Texarkana, where, soon after, failure resulted. The firm was

composed of E. M. and John F. Newton. E. M. Newton was the managing partner, and had full charge and control of the business. Until 1904 the firm conducted both wholesale and retail stores, but in the summer of that year decided to, and did, close out and dispose of their retail business, and afterward confined themselves to the jobbing trade. Their net worth was then over $15,000.00. (Rec. pp. 137-8-9, 67.)

Up to that time Swofford Bros. Dry Goods Company (a corporation), manufacturers and wholesalers at Kansas City (hereinafter referred to as Swoffords), had extended to Newton & Company (hereinafter referred to as Newtons) a line of credit limited to about $5,000.00; but when the latter decided to embark in the wholesale business exclusively and more extensively, and asked to enlarge their indebtedness, Swoffords were unwilling to meet their increased demands for goods and to extend in the regular way the additional line of credit requested. The old account was then closed up and a new and different arrangement was made for future dealings by the execution, on the 20th day of July, 1904, of the conditional sale contract set out by the Court of Appeals in its finding of facts (Rec. 199) and on page 9 of this brief.

This instrument was not recorded, *there being no law in Arkansas either requiring or permitting the recording of conditional sale contracts.*

Under said contract Swoffords sold and delivered to Newtons, between its date and April 27th, 1905, goods aggregating in value $15,389.57, and during the same period payments amounting to something over $2,000.00 had been made from time to time to apply upon the purchase price, leaving a balance due to Swoffords of $13,310.56.

The merchandise purchased by Newtons under the contract referred to was bought in large quantities for jobbing purposes. It was shipped by Swoffords and kept by Newtons in the original packages. The boxes, packages and goods themselves, when shipped and when returned, bore Swoffords' name, brands, marks and lot numbers, and were therefore easily identified. (Finding of Fact No. 4, Rec. 200.)

On the 30th day of June, 1905, Newtons being unable to pay Swoffords the amount so remaining due, voluntarily returned to it a portion of the merchandise so purchased under said contract, worth at cost price $5,337.21, and at the same time upon demand they endorsed and delivered to Swoffords certain customers' notes aggregating, at face value, $1,684.32, and assigned to it certain book accounts aggregating $8,277.04 as being the proceeds derived from sales of goods purchased under said contract. (Rec. 200.) Said assignment was in writing, and (omitting the list of names attached thereto) reads as follows:

"In pursuance of our contract, dated July 20th, 1904, with Swofford Bros. Dry Goods Company, and for value received we hereby sell, assign, transfer and deliver to said Swofford Bros. Dry Goods Company, the following book accounts, aggregating $8,227.04, due and payable to us for goods of the said Swofford Bros. Dry Goods Company, sold and delivered by us to customers here listed under the contract above referred to. Witness our hands this 30th day of June, 1905."

"Witness: Leo Krause."

"E. M. NEWTON & Co.,
By E. M. Newton."

BANKRUPTCY.

On the 3rd day of July, 1905, three days after Swoffords had been given complete possession of said merchandise, notes

and accounts, Newtons filed their voluntary petition in bankruptcy, and were adjudicated bankrupts by Hon. A. H. Sevier, Referee, to whom the case was duly referred. Thad. A. Bryant (appellant) was appointed receiver of their estate in bankruptcy, and duly qualified. Acting under the order of the referee, he immediately demanded of Swoffords the goods, notes and accounts which it had so received from Newtons, but his demand was refused. (Finding No. 8, Rec. 200.)

Negotiations were then begun between the receiver and the referee on one part and Swoffords on the other, looking to the preservation of said property and the avoiding of loss and deterioration in the value thereof pending any litigation which might ensue regarding same; and on the afternoon of July 4th the following stipulation (Finding No. 8) was entered into between Swoffords and the receiver, and approved by the referee:

STIPULATION.

(Title of court and cause omitted.)

"Whereas, E. M. Newton & Company, the above named bankrupts, on the 30th day of June, 1905, returned and delivered to Swofford Bros. Dry Goods Company merchandise invoicing at original cost price $5,337.21, *which had been sold and delivered to said bankrupts by said Swofford Bros. Dry Goods Company under and by virtue of a written contract between said parties, bearing date July 20th,* 1904, and at the same time pursuant to said contract said bankrupts transferred and delivered to said Swofford Bros. Dry Goods Company notes of the face value of $1,684.32 and accounts of the face value of $8,277.04, *which are hereby admitted to be the proceeds of other merchandise sold and delivered by said Swofford Bros. Dry Goods Company to said bankrupts under and by virtue of the contract aforesaid,* and by said bankrupts sold and delivered to their customers in the regular course of trade pursuant to said contract, *and said Swofford Bros. Dry*

Goods Company are in the actual, sole, exclusive and adverse possession of said merchandise, notes and accounts above mentioned, and have refused to surrender the possession of the same to the receiver of the estate of said bankrupts, *except under the admissions, terms and stipulations of this agreement;* and whereas the receiver of said estate now claims, and the trustee to be hereafter elected may claim that said merchandise notes and accounts belong to the estate, now, therefore, to avoid deterioration in the value of said property which would necessarily ensue pending any litigation or proceedings that may arise concerning same, it is hereby stipulated and agreed by and between Swofford Bros. Dry Goods Company and T. A. Bryant, receiver herein, *by and with the authority and approval of the referee* in bankruptcy, that the said merchandise, notes and accounts held by the said Swofford Bros. Dry Goods Company may be offered for sale and sold by the receiver at the time and place of sale of the stock of merchandise of the above named estate now in his hands, it being agreed and understood that the notes and accounts herein referred to shall be sold separately and apart from the balance of the property, and that said merchandise shall first be offered for sale separate, and apart from said other property, and the highest and best price there bid for same shall be deemed and considered the price received therefor, even though said receiver or trustee may thereafter, if he deem it advisable, sell all merchandise, including that herein referred to, in bulk; and upon making said sale, said receiver shall take from the proceeds set apart as a separate fund the amount received from the sale of the notes and accounts aforesaid, and shall also set apart in said separate fund an amount of money equal to the highest bid received on said merchandise when offered separately, and the amount thus set apart for the notes and accounts and said merchandise, shall be held by the court and deposited in bank until all questions regarding the title and right of possession to the same are finally settled and determined by a court of competent jurisdiction, whereupon, if determined in favor of Swofford Bros. Dry Goods Company, said amount is to be forthwith turned over to said Swofford Bros. Dry Goods Co., or its attorney, free and discharged of all fees, charges and expenses, of whatever kind or nature; and it is further agreed and

understood that the fund so derived from the sale of said merchandise and notes and accounts as aforesaid and held intact as a separate fund shall remain and be in lieu of the property so sold, and the title and right of possession of the Swofford Bros. Dry Goods Company in and to said fund shall be and remain the same as its title in and to the merchandise, notes and accounts aforesaid.

It is further agreed and understood that said Swofford Bros. Dry Goods Company is to be in no wise prejudiced by the fact that the proceeds of said sale are paid into and retained by said court until the termination of such litigation as may arise.

Dated this July 4th, 1905.

SWOFFORD BROS. DRY GOODS COMPANY,
By E. S. ELLIS, *Its Attorney,*
T. A. BRYANT, *Receiver.*

Approved: A. H. SEVIER, *Referee.*

Following the execution of, and under, said stipulation, Swoffords delivered the merchandise and the notes and accounts in controversy to the receiver, who (after being elected and qualified as trustee) sold the merchandise for $3,135.00. The notes and accounts were not sold at that time, but at the time of the hearing herein before the master, the trustee had collected $2,500.00 on the notes and accounts, and he has kept all such proceeds in a separate fund, as provided in said stipulation. (Finding No. 9, Rec. 201.) (*Since the hearing, the notes and accounts remaining uncollected have been sold by the trustee, but this fact is not shown by the record.*)

THE PLEADINGS.

Thereafter, Swoffords filed a petition in intervention (Rec. pp. 168) setting up the facts in detail substantially as herein stated, attaching thereto copies of the contract of conditional sale, the written assignment of the notes and accounts and the

stipulation with the receiver, and asked for an order requiring the trustee to deliver to it said property or the proceeds thereof.

The trustee answered and intervenor replied, and upon the issues so joined testimony was taken before the referee as special master. But at the close of the testimony the master, over the objection of intervener, permitted the trustee to file an "amended and substituted answer" (Rec. p. 183) which admitted substantially all of intervener's claims, and made the larger part of the evidence then taken unnecessary.

In his "substituted answer" the trustee abandoned many of the allegations of his previous answer, and rested his case upon three propositions, viz: (1) That said stipulation had been entered into by the receiver and approved by the referee through fraud and mistake of fact, and therefore same was not binding on creditors of the bankrupts; (2) that the conditional sale contract of July 20th, 1904, under which the goods had been sold by Swoffords, was void as to the trustee and creditors of the bankrupts for want of recording; (3) that some of the goods returned by Newtons had not been purchased of Swoffords and that the notes and accounts assigned were not exclusively the proceeds of Swoffords' goods.

But said substituted answer of the trustee did not contain any of the allegations required by Section 60 of the Bankrupt Act as a condition precedent to recovery on the part of the trustee; that is to say, said substituted answer did not allege: (1) that Newtons were insolvent at the time they delivered the property in controversy to Swoffords; (2) did not allege that Newtons had creditors other than Swoffords of the same class, or of any class whatever; (3) it did not allege that the intention of Newtons and the effect of the delivery of said property was to

enable Swoffords to obtain a greater percentage of its debt than other creditors of the same class; (4) it did not allege that Swoffords knew of the insolvency of Newtons and had reasonable cause to believe that a preference to them was intended.

But, notwithstanding the trustee in said answer attacks the validity of the stipulation under which the property in controversy came into the hands of the court, *no return of such property to Swoffords was ever made by him or tendered.*

Intervener replied, denying the allegation of fraud and mistake in the execution of said stipulation; alleging that the trustee was estopped from claiming fraud or mistake in the execution thereof so long as he ratified the same by continuing to hold the disputed property thereunder; averring that the trustee stood merely in the shoes of the bankrupts and was bound by their acts, and that he was in no sense a creditor, mortgagee, or subsequent purchaser in good faith. (Rec. 187.)

REPORT AND JUDGMENT.

The special master made a report (Rec. 145) holding the conditional sale contract of July 20th, 1904, valid and binding, and finding in favor of Swoffords as to the goods returned and notes indorsed to them by Newtons. But he ignored the stipulation entered into by the receiver and approved by the referee, and finding that the proceeds of goods bought from Swoffords under said conditional sale contract constituted fifty per cent of all the book accounts of Newtons, recommended that the same should be equally divided—those assigned to Swoffords as well as those turned over to the trustee—between Swoffords and the trustee.

Both sides filed exceptions to the master's report. (Rec. pp. 152, 155.) The District Court, however, in rendering its deci-

sion, referred neither to the report nor to the exceptions filed thereto; but, ignoring both, held that the contract of July 20th, 1904, was a mortgage and void as against the trustee for want of recording, and decided entirely in favor of the trustee. (Rec. p. 157.)

From the ruling of the District Court intervener appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which reversed the judgment of the lower court, and ordered a decree entered in favor of intervener.

With its opinion the Court of Appeals filed findings of fact, and conclusions of law (Rec. 193, 198 *et seq.*) which, for more convenient reference we copy below, omitting therefrom only the signatures and the title of court and cause.

FINDINGS OF FACTS.

(Rec. 198 *et seq.*)

"On July 20, 1904, Ernest M. Newton and John F. Newton, partners, as E. M. Newton & Co., merchants at wholesale and retail in Arkansas, and Swoffords Bros. Dry Goods Co., a corporation of Kansas City, Missouri, engaged in the wholesale dry goods business, entered into a written contract as follows:

'KNOW ALL MEN BY THESE PRESENTS: That E. M. Newton & Co., of New Louisville, Lafayette County, Arkansas, a co-partnership, composed of E. M. Newton and J. F. Newton, party of the first part, has this day purchased from Swofford Bros. Dry Goods Co., and said Swofford Bros. Dry Goods Co., party of the second part, has sold to said E. M. Newton & Co., certain goods upon the following express conditions:

'1. Said goods shall be selected by said first party from sample or from stock of said second party at Kansas City, Missouri, and same shall be shipped to said first party upon their request to New Louisville, Arkansas, from which place they shall not be removed without the written consent of said second party save and except that said first party shall have the right

to sell said goods in the ordinary course of business, but not otherwise.

'2. Said second party shall prepare at time of shipment full and complete invoices of the goods so sold and selected and shall deliver copies of said invoices by mail or otherwise to said first party. Such invoices shall consist of itemized list of the articles so sold and shipped with the price and value of each article, and shall show also the credit terms upon which the same are sold and the rate of discount, if any, which is to be allowed upon payment of the purchase price in cash upon delivery or at an earlier date than that specified in said credit terms.

'3. The title to and right to immediate possession of all the goods so sold and shipped by said Swofford Bros. Dry Goods Co. and of the proceeds derived from the sale of the same by the first party, whether in cash or note or book account, shall be vested and remain in said Swofford Bros. Dry Goods Co., until the full purchase price and the agreed value of the same shall be paid by said E. M. Newton & Co. to said Swofford Bros. Dry Goods Co., in cash; and any and all notes, checks and accepted drafts shall not be considered as payment, but merely as evidence of indebtedness. And upon taking possession of any notes and book accounts derived by said first party from the sale of said goods or any part thereof, said Swofford Bros. Dry Goods Company shall have the right to collect the same either in its name or in the name of E. M. Newton & Co., by suit or otherwise, and in case of disputed notes and accounts against persons of doubtful solvency, said second party may compromise and settle the same or may extend the time of payment thereof in such manner and upon such terms as may to it seem advantageous, and any new notes taken thereafter, whether in the name of Mr. E. M. Newton & Co., or in the name of said Swofford Bros. Dry Goods Co. shall be held and considered in all respects the same as the original evidence of indebtedness.

'4. This contract and the terms thereof shall apply to all future orders given by the E. M. Newton & Co. and to all future sales and shipments made to them by said Swofford Bros. Dry Goods Co. so long as any part or portion of the purchase price of the goods sold and delivered hereunder shall remain unpaid, said Swofford Bros. Dry Goods Co. shall have the right

to terminate this contract at any time, and said E. M. Newton & Co. may terminate the same at any time by paying in full in cash whatever balance of the purchase price of the goods purchased and shipped shall then remain unpaid. Delivery of the goods properly packed and marked to a common carrier at Kansas City, Mo., consigned to the first party as above specified shall be deemed and considered a full and complete delivery thereof, by said second party and all freight and transportation charges shall be paid by said consignees. The acceptance of goods subsequently sold and shipped by the first party and the placing of the same in their stores and warehouses at New Louisville, Ark., or elsewhere, shall be held and considered sufficient to bring such goods within and under the terms of this contract, and it shall not be necessary or essential that the fact that goods ordered by first party or sold and shipped by second party are within and under the terms hereof, shall be mentioned or referred to in the order so given or in the invoices given and delivered with each invoice.

'Said first party shall keep all goods purchased hereunder properly insured at their expense for the benefit of second party; but the loss or destruction of such goods by fire or otherwise, shall not cancel the indebtedness thereof but said first party shall still remain liable to second party for any part of the purchase price remaining unpaid.

'In Witness Whereof, the parties above named have hereunto placed their hands and seals in duplicate this 20th day of July, 1905.

E. M. NEWTON & Co.,
SWOFFORD BROS. DRY GOODS CO.
By W. N. MOORE, *Sec.*"

"2. The contract was not filed or recorded.

"3. Pursuant to the contract, and prior to June 30, 1905, the Dry Goods Company delivered to the Newtons goods of the value of $15,369.57. The latter paid on account thereof the sum of $2,059.01. On June 30, 1905, the unpaid balance was $13,310.56.

"4. The goods delivered under the contract were placed by the Newtons in their stock with other goods obtained from other

parties, but they were of such character and contained such marks as rendered them capable of being identified and separated. It was contemplated by the parties that the Newtons might sell the goods so delivered in the usual course of their business. The Newtons did not keep separate accounts of their resales of the goods nor did the Dry Goods Company require them to make reports thereof.

"5. On June 30, 1905, when the Newtons were insolvent and the Dry Goods Company knew it, they surrendered to the Dry Goods Company, as belonging to it, under the provisions of the contract, goods of the value of $5,337.21, notes to the amount of $1,684.32 and customers' accounts to the amount of $8,277.04. The goods were so surrendered by the Newtons as being the unsold part of those delivered under the contract, and the notes and accounts as representing proceeds of their sales of like goods. Actual possession was taken by the Dry Goods Company.

"6. In fact, the goods surrendered to the Dry Goods Company were, with slight exception, goods that had been delivered under the contract, but only about one-half in amount of the notes and accounts surrendered represented proceeds of other goods delivered under the contract.

"7. On July 3, 1905, three days after the surrender of the property as above mentioned, the Newtons filed their voluntary petition in bankruptcy, were adjudged bankrupts, and Thad. A. Bryant was appointed receiver. In one of the schedules attached to the verified petition in bankruptcy the Dry Goods Company was listed as a secured creditor with a statement of the facts upon which its rights were based, and recitals of the surrender to it of the goods, notes and accounts; that the notes and accounts were proceeds of the goods furnished by the Dry Goods Company under the contract and resold by the Newtons to their customers, and that the goods, notes and accounts were then in possession of that Company.

"8. After the appointment of the receiver in the bankruptcy proceeding he demanded from the Dry Goods Company possession of the goods, notes and accounts mentioned. The demand was refused, but afterwards the Dry Goods Company surrendered them to the receiver under a written stipulation that

they might be disposed of by him in connection with the sale of the other property in his hands, but that the Dry Goods Company should not be prejudiced thereby, and the proceeds should be held in lieu of the property so surrendered to abide the determination of a court of competent jurisdiction as to the ownership thereof, and if the Dry Goods Company prevailed it should have the proceeds free of fees, charges and expenses. As one of the conditions upon which it was made it was expressly admitted in this stipulation that the goods, notes and accounts in controversy were then in the actual, exclusive and adverse possession of the Dry Goods Company; that the goods were part of those delivered to the Newtons under the contract of July 20, 1904, and that the notes and accounts were proceeds of other goods delivered under that contract. This stipulation was made subject to the approval of the referee in bankruptcy. It was executed by the Dry Goods Company and the receiver, and the referee duly endorsed his approval thereon. Upon the faith thereof the goods, notes and accounts were then surrendered to the receiver. No fraud nor deception was practiced by the Dry Goods Company upon the referee or the receiver in connection with the making of the stipulation.

"9. Thad. A. Bryant, who had been receiver, was duly selected as trustee. He sold the goods in controversy for $3,135.00. The notes and accounts were not sold, but at the time of the hearing of this matter before the referee he had collected $2,250.00 on account thereof, and still retained in his hands those that were uncollected. He has kept a separate account of these funds, and held sufficient funds to answer the result of the litigation.

"10. The Dry Goods Company thereupon presented its intervening petition, seeking the payment to it of the sums realized as mentioned in the preceding finding and the restitution to it of the uncollected notes and accounts. The controversy in this cause was presented by the intervening petition, the trustee's answer thereto and the reply of the Dry Goods Company.

CONCLUSIONS OF LAW.

"1. The contract of July 20, 1904, is a contract of conditional sale and not a mortgage, and as such was not required by the laws of Arkansas to be filed or recorded.

"2. Under the laws of Arkansas the contract was valid as between the parties thereto notwithstanding the fact that it authorized the vendees to resell the goods delivered thereunder.

"3. It was also valid, as between the parties thereto, not only in respect of such of the goods delivered thereunder as remained unsold when the vendor demanded and secured possession from the vendees, but also in respect of the notes and accounts which represented proceeds of like goods resold by the vendees to their customers, and which could be so identified and segregated.

"4. The contract being valid under the local law, as between the parties thereto, the trustee in bankruptcy of the vendees cannot avoid or defeat the title of the vendor who took possession prior to the institution of the proceedings in which the vendees were adjudged to be bankrupts. The trustee has no greater right or title than the bankrupts.

"5. Inasmuch as the bankruptcy court obtained from the vendor possession of the notes and accounts in controversy upon the faith of a stipulation, made with its approval and without practice of fraud or deceit, that such notes and accounts were the proceeds of goods covered by the contract of conditional sale, and still holds to such possession, the trustee is estopped from disputing the fact stipulated.

"6. Swofford Bros. Dry Goods Company, the vendor, is entitled to a decree that the trustee in bankruptcy pay to it the sum of $3,135.00, the proceeds of the goods in controversy, and the further sum of $2,250, the collection of notes and accounts in controversy made by the trustee prior to the hearing before the referee, and also for such collections as may have been made since that time, and for the surrender of such of said notes and accounts as remain uncollected, and for costs. The sums mentioned should be paid in full."

OPINION OF THE COURT.

By Hook, Circuit Judge (Rec. p. 193, *et seq.*)

"The appellant intervened in the bankruptcy proceedings claiming to be the owner of certain goods, notes and accounts under the terms of a written contract made with the bankrupts

about a year before the proceedings were instituted. The contract provided, in substance, that appellant should sell goods to the bankrupts to be resold by them in the usual course of their business in Arkansas, but that the title to and right of possession of all goods delivered under the contract and of all proceeds of resales thereof, whether in cash, note or book account, should be vested and remain in appellant until the purchase price had been fully paid to it; that except for the right to resell the goods in the ordinary course of their business the bankrupts should not remove them from the city in which they were doing business; also that they should keep the goods insured for the benefit of appellant. The contract was not recorded. Thereafter and at a time when the bankrupts were insolvent and appellant knew it, they turned over to appellant the remainder of the goods then on hand, and certain notes and accounts which were claimed to be proceeds of other goods obtained under contract and resold by them to their customers. The notes were endorsed and the accounts assigned in writing to appellant. Three days afterwards, voluntary proceedings in bankruptcy were commenced and an adjudication was made. A receiver was appointed who demanded possession of the property from appellant; the demand was refused. Subsequently, however, the goods, notes and accounts were delivered to the receiver under a written stipulation made with the approval of the referee in bankruptcy that the appellant should not be prejudiced thereby: that while the property might be converted into cash, the proceeds should be held to abide the final determination of the controversy as to the ownership. The receiver succeeded himself as trustee. The goods were sold and part of the notes and accounts were collected by him. By its intervention the appellant sought the proceeds of the sale and the collections and such of the notes and accounts as remained on hand. On final hearing the District Court held that the contract under which appellant sold the goods to the bankrupts was in effect a chattel mortgage and not a contract of conditional sale, that it contemplated that the bankrupts as mortgagors should retain possession of the goods with authority to resell them in the usual course of their business and without obligation to pay over the proceeds to the

appellant, and that it was therefore fraudulent and void under the doctrine of Twyne's case obtaining in Arkansas.

The case must be considered upon the assumption that the goods which were returned to the appellant three days before the commencement of the bankruptcy proceedings were part of the identical goods originally sold by it to the bankrupts under the contract, and also that the notes and accounts were proceeds of like goods. When the bankruptcy proceedings were commenced the appellant was in possession of the goods, notes and accounts and claimed them adversely to the receiver. It refused to surrender them until a stipulation recognizing the verity of the facts as claimed by it to exist was made with the approval of the referee. Upon the faith of that stipulation the court of bankruptcy acquired possession. By voluntarily yielding possession of property which was to be the subject of litigation the appellant parted with an advantage well recognized in the law; and the agreement that its rights should not be prejudiced thereby, and that the facts existed upon which its claim of title was predicated, should not be permitted to be repudiated, especially since it received the solemn sanction of the court of bankruptcy, and since the trustee whose present possession depends upon the act of the receiver holds fast to the advantage secured. There was no fraud practiced by the appellant in securing the stipulation and the fact that the receiver and referee may possibly have acted improvidently affords no sufficient cause for ignoring its terms. Therefore, the only questions that are open are those which arise from the face of the original contract, the failure to record it and the fact that the appellant secured possession of the property on the eve of the proceedings in bankruptcy with knowledge of the insolvent condition of the bankrupts.

We are not able to assent to the contention that the contract authorized the bankrupts to resell the goods in the usual course of their business, without obligation to pay the proceeds to appellant. The appellant expressly reserved the title to the proceeds in whatever form they might be and the right to take possession of the notes and accounts arising from resales and collect them for itself. From these provisions an obligation of the bankrupts to account for and pay over such proceeds as they collected is plainly implied, and if it was not fulfilled there

would be a breach of contract as much as if a mortgagor of chattels without power of sales should nevertheless dispose of the mortgaged property and appropriate the proceeds to his own use.

Whether the contract under which appellant claims is one of conditional sale or is a chattel mortgage, and as between the parties thereto whether it is valid and what the effect of the failure to record it may be, are questions to be determined exclusively by the local law. (*Thompson* v. *Fairbanks,* 196 U. S., 516; *Humphrey* v. *Tatman,* 198 U. S., 91; *York Mfg. Co.* v. *Cassell,* 201 U. S., 344.)

Whatever may be the law in some jurisdictions it is authoritatively settled in Arkansas that a contract of conditional sale is valid notwithstanding it contains a provision that the vendee may sell the property in the usual course of his business.

Triplett v. *Implement Co.,* 68 Ark. 230, 57 S. W., 261, involved a contract of that character and the conditional vendor was allowed to recover the goods from the vendee's assignee in insolvency who had taken possession of them. The court cited with approval *Perkins* v. *Mettler,* 126 Cal., 100, 58 Pac., 384; *Dewes Brewing Co.* v. *Merritt,* 82 Mich., 198, 46 N. W., 379, *and Baring* v. *Galpin,* 57 Conn., 352, 18 Atl., 266. In one of these cases the contract of conditional sale of a stock of merchandise expressly provided that the vendee might resell in the usual course of business and in the other two cases resales by the conditional vendees were held to have been in contemplation. In all of them the contracts were sustained as contracts of conditional sale. The contract involved in the Arkansas case provided that the title of the vendor should extend not only to the property, but also to the proceeds of sales thereof made by the vendee. It is true that in this connection the court observed that if the goods were sold by the vendee they were to be sold as the property of the vendor, but we are unable to perceive how this difference is of importance in considering the peculiar circumstances of this case. If a conditional vendee sells the goods and mingles the proceeds with proceeds of his own goods so that they become indistinguishable the vendor may lose title, but the case before us presents no such difficulty. It was expressly agreed in the stipulation that the notes and accounts involved

here were the proceeds of goods delivered to the bankrupts under the contract of conditional sale, and that agreement obviates all difficulties in tracing title. Observing the terms of the stipulation there was no admixture of the proceeds of sales by the bankrupts with the proceeds of other goods. It was as though no other goods had been sold or as though the sales had been made in the name of the appellant and the notes and accounts taken accordingly. Therefore, under the stipulation and the rule of *Triplett* v. *Implement Co.*, it must be held that as between the appellant and the bankrupts the former was the owner of the goods, notes and accounts in controversy. And further that under the doctrine obtaining in Arkansas it would have remained such owner even had an assignee in insolvency of the vendee first secured possession of them. There is no law in Arkansas requiring a contract of conditional sale to be filed or recorded in any public office.

Notwithstanding the views which this and other courts have at times entertained as to the effect of an adjudication in bankruptcy and the right and title of the trustee resulting therefrom it has been definitely settled by the Supreme Court that the trustee is vested with no better right or title than belonged to the bankrupt; that he stands simply in the shoes of the bankrupt, and, as between them, he has no greater right. *York Mfg. Co.* v. *Cassell, supra.* The right of appellant in this case did not first come into existence when it took possession of the property in controversy on the eve of the bankruptcy proceedings. On the contrary it was secured by the contract which was executed almost a year before and it is that date which we must regard rather than the date when possession was taken. The order of the District Court must, therefore, be reversed and the cause remanded for further proceedings in conformity with this opinion."

Of the ruling by the Court of Appeals the trustee now complains and brings the case here.

BRIEF OF THE ARGUMENT.

I.

The stipulation entered into between Swoffords and the receiver, under the supervision and with the approval of the referee, by virtue of which Swoffords surrendered possession of the property in controversy to the court, and under which it was later sold by the trustee who now holds the proceeds, is valid and binding on the parties to this action, and can not be repudiated nor ignored by the trustee. The acceptance and retention of benefits thereunder by the trustee operates as a ratification of same on his part, and as a waiver of any lack of authority or irregularities in its execution.

II.

Under said stipulation the facts as to whether all of the goods returned by Newtons to Swoffords were actually bought from them, and as to whether the notes and accounts assigned by Newtons to Swoffords represented exclusively proceeds derived from a sale of their goods, has been settled and agreed upon, and are not questions to be litigated in this action. Judgment in relation thereto must, therefore, be made upon the basis of said stipulation.

III.

The written instrument of July 20th, 1904, executed by Swoffords and Newtons, and under which the property in controversy was sold by Swoffords and later returned to it by Newtons, is a contract of conditional sale; and there is no law in Arkansas which either requires or permits it to be filed or re-

corded. It is valid between the parties, and valid, also, against the trustee in bankruptcy, who stands merely in the shoes of the bankrupts, and is in no sense a creditor armed with process, a subsequent mortgagee or a purchaser in good faith.

IV.

But if said instrument be construed as a mortgage, it is likewise valid as between the parties, and valid also as against the trustee in bankruptcy for the reasons above stated.

V.

The vital error of the appellant is therefore not so much in placing a wrong construction upon the contract itself, as in defining the status of the trustee in relation to it under the law and the facts and circumstances of this case.

VI.

The answer of the trustee does not state facts sufficient to constitute a defense to intervener's petition, or to show a right to recover vested in him, because it does not allege; (1) That Newtons were insolvent at the time they transferred to Swoffords the property in controversy; (2) That Newtons had creditors, other than Swoffords, of the same class; (3) That the intention of Newtons and the effect of the transfer was to enable Swoffords to obtain a greater percentage of their debt than other creditors of the same class; (4) That Swoffords knew of such insolvency, and had reasonable cause to believe that such a preference was intended by Newtons.

ARGUMENT AND BRIEF.

The first question raised by appellants is as to the power and authority of the receiver, under the direction and with the approval of the court, to enter, with Swoffords, into the stipulation of July 4th, 1905 (shown in full at page 5 hereof, and at page 176 of the record), under the terms of which the property in controversy came into the hands of the court.

Never, since the decision was rendered by this court in *Bryan* v. *Bernheimer*, 181 U. S., 188 (21 Sup. Ct. Rep., 557), has there been any doubt of the jurisdiction and authority of courts of bankruptcy to not only take possession by and through a receiver of property claimed to belong to the bankrupt in the hands of adverse holders, but to hear and adjudicate the rights of such adverse holders prior to the election and qualification of a trustee. In that case the exact question is thoroughly discussed and fully decided.

And if, as is there decided, the receiver, representing the the estate, has power and authority to frame and conduct the trial of the issues involved, it necessarily follows that such receiver has power and authority to make such agreements and stipulation in the matter as may become necessary or which may be deemed expedient. And especially is this true, where, as in the case at bar, the stipulation of the receiver is made under the direction and with the approval of the court itself.

Stipulations made during the progress of, or in regard to litigation are upheld and favored by the courts. Where an agreement is made in relation to the facts, it has the binding force of a finding by a court or jury. (20 Ency. Pl. & Pr.,

622, 668 and notes.) A stipulation will be construed like other contracts or written instruments *inter partes,* (Id., 657); they can only be avoided or set aside for the same reasons that would avoid other contracts (Id., 662); and then only in cases where the parties can be placed in *statu quo* (Id., 663); "there is no rule of law better settled, and none can be more equitable and just, than that where a party to a cause is relieved from his own stipulations, the adversary should be restored to all the rights he had when such stipulations were entered into" (Id., 669). In order to obtain relief against a stipulation the regular course is not simply to ignore or attempt to evade it, but to make a formal application to the proper court for its revocation (Id., 666).

But, under the circumstances of this case, as shown by the findings, the issue sought to be raised by appellant as to the power of a receiver, is a false one. A decision of it now cannot control—cannot even affect—the ultimate result in this case. For the stipulation is no longer an executory contract. It has been executed fully and completely on the part of Swoffords, and just as fully and completely on the part of the court, through its officials, the receiver and trustee, with the sole exception of turning over the proceeds of the property obtained thereunder. The trustee, by his course and conduct, has approved, ratified and adopted the stipulation made by the receiver, and has reaped the benefits accruing to him and to the estate of the bankrupts thereunder. It is elementary that one cannot accept the benefits of a contract, and at the same time avoid and repudiate the burdens thereby imposed. Regardless of whether, in law or in fact, the receiver was clothed with authority to make the stipulation in the first instance, the trustee

is now in the familiar position of a principal who has accepted the benefits of an unauthorized contract made by his agent, or by a person wrongfully assuming to be his agent, and who has thus by ratification or by the doctrine of estoppel given to the contract all the force and virtue it would have had if originally authorized.

That there was neither fraud nor deception on the part of Swoffords in the making of the stipulation is expressly found in finding number 8; and such finding is in exact accord with the personal statement of the referee made on the record at page 44. But if the facts were otherwise the trustee cannot repudiate the instrument while he still retains benefits thereunder.

Swoffords may have acted improvidently in making the stipulation, or it may have been an improvident act on the part of the court; but we insist that the trustee can no more repudiate the terms of the stipulation under which he, with the approval of the court, obtained and still holds possession of the property in dispute, than Swoffords may now repudiate the sale of the property made by the trustee under its terms, and insist, in case of recovery, upon an order for the return of the identical goods, or that their value be ascertained in some manner other than by the sale therein agreed upon.

And is not the suggestion made by appellant in the closing paragraph of his argument on this branch of the case an idle one?

Is it not absurd to think for a moment that the mere turning over by the trustee to Swoffords of the proceeds derived from a sale of the property after a lapse of nearly four years, and after expensive litigation, extending from the lowest to the highest court, has ensued, will restore the *statu quo* of the par-

ties? Let us reflect: Before signing the stipulation, Swoffords were in the actual and exclusive possession of all the property in controversy. It could have sold the merchandise to customers of its own seeking, at prices and on terms of its own making, and in such lots and quantities as it might choose. These rights and privileges it surrendered by the stipulation, and the merchandise has all been sold under its terms. Swoffords had the right to proceed in its own way to collect the notes and accounts; to sell the same, to compromise, or to secure and extend a part or all them as in its judgment might ultimately bring the best results. These rights and privileges it also surrendered by the stipulation, and the notes and accounts have been collected, so far as collections have been made at all, under methods chosen by the trustee. Many of the notes and accounts have become barred by limitation, and as a matter of fact, (although it does not appear in the record), all remaining uncollected have, since the original hearing in this case, been sold by the trustee. Having realized the money from a sale of the merchandise and from collection or sale of the notes and accounts, Swoffords could have held and used the same pending litigation. This right it likewise surrendered, and as a consequence the proceeds derived by the trustee from the property have been locked up in court for nearly four years, and will remain there to the end, without bearing with it even so much as a partial solace in the way of accumulated interest.

Is it not preposterous for anyone to say that a mere return by the trustee to Swoffords of the bare proceeds of the property in controversy—proceeds derived at such a cost and sacrifice to them—can be deemed an adequate restoration of rights surrendered? Can the dead be brought back to life again?

The trustee has not been misled. His attention was called to the inconsistency of his position at the very beginning in the replies filed by intervener to his answers (Rec. 182, 189). He chose, deliberately, to ignore the stipulation under the very terms of which he was holding the property in controversy, and from which he had received and was still receiving benefits. He is, therefore, too late in asking now to be allowed to return the property, and to seek a recovery on other grounds. If there were nothing else to be considered, to grant such a request would be to permit him to trifle with the courts—to use them merely as a convenient means of experimentation.

II.

For his second ground of complaint, appellant insists that the court of appeals erred in not holding that the contract of July 21st, 1904, was a mortgage or a secret lien which was fraudulent as to creditors.

But here again appellant misses the mark completely, and raises another false issue—sets up another man of straw—and devotes nearly thirty pages of his brief in the argument of a question which has and can have no bearing on the case. For the controversy is not between Swofford and *creditors of the bankrupt,* but between Swoffords and *the trustee standing squarely in the shoes of the bankrupt,* and having no further or additional rights.

We insist that except in the interest of accurate statement, it is wholly immaterial whether the contract of July 20th, 1904, entered into between Swoffords and Newtons, be called a contract of conditional sale or a chattel mortgage, for, upon either theory, under the laws of Arkansas, with the claimant in pos-

session, the instrument is valid and intervenor entitled to recover. We regard the instrument, however, as unquestionably, a contract of conditional sale, and will so first discuss and consider it. And as the laws of Arkansas must govern, we shall confine our citation of authorities to decisions from the Supreme Court of that state.

"The line of discrimination between mortgages and conditional sales cannot be marked out by any general rule; but in every case the true nature of the transaction, and the intention of the parties, must be determined by its own circumstances."

Johnson v. *Clark*, 5 Ark., 321;
Porter v. *Clements*, 3 Id., 364;
Blakemore v. *Burnside*, 7 Id., 505;
Stryker v. *Hershey*, 38 Id., 264;
Hershey v. *Luce*, 56 Id., 320.

While the rule of construction as stated above by the Arkansas court has particular reference to cases where property already owned by a vendor has been transferred with a contract back from the vendee to reconvey to the vendor upon repayment of the purchase price within a given time, and the question to be decided is as to whether the contract back shall, upon default, be strictly construed, so as to bar the vendor, or whether both instruments shall be construed together merely as a loan secured by a mortgage, and the vendor be thus afforded a more liberal right of redemption; still if the rule be applied to the case at bar, the contention of intervenor must be upheld.

CIRCUMSTANCES.

The circumstances surrounding this transaction, briefly stated, were these: Newtons, intending to enlarge their wholesale business, were in the market for large quantities of goods, and their future demands would likewise be heavy. Their pur-

chases of particular merchandise were in large lots—so many cases of this, so many dozens or gross of that—and in the orderly conduct of their jobbing business, such goods must, for convenience and of necessity, be kept together—largely in the original cases and packages in which same were shipped, as is the custom in wholesale houses, and not scattered nor mixed with other goods as in retail stores. The merchandise to be bought of Swoffords would therefore be kept substantially intact until sold, and would retain thereon their name, brands, lot numbers, sale marks, etc., and always be easy of identification; and the fact that other goods likewise bought in case and dozen lots, should also be stored in the same room or building, would not produce confusion. Similarly, sales by Newtons to country merchants would also ordinarily be made in larger quantities than in a retail business, so that the keeping of separate accounts for such of Swoffords' goods as should be sold would not be at all impossible or difficult. Moreover, Swoffords did not care for nor insist upon security beyond that afforded by such of their goods as should remain on hand, and the cash, notes and accounts representing the proceeds of those sold. A conditional sale contract would effect this without interfering with any other goods or any other property, and was therefore peculiarly applicable and desirable.

Not a dollar of old indebtedness was to be secured by the transaction; not a dollar's worth of other merchandise or other property was to be included or affected by a lien. And it has neither been alleged nor shown that a single dollar of old indebtedness was actually paid thereby. Had a mortgage been intended by the parties, undoubtedly the instrument would have been so written as to include all the merchandise of Newtons',

whether purchased of Swoffords or from other parties; and, likewise, undoubtedly the mortgage would have been so drawn as to secure the $5,000.00 of old indebtedness then past due.

But no mortgage was intended or contemplated by the parties. The merchandise being bargained for was Swoffords'; they could sell or refuse to sell, as they chose. They agreed to sell, but upon the *"express condition"* that their title and right of possession should not cease or pass to the vendee until the purchase price was fully paid. In doing this, they took no advantage of anyone; they neither sought nor took hold upon anything but what was unquestionably their own property. Will the court now reconstruct the bargain?

At that time Newtons, as shown by their written statement made to Swoffords (Rec. pp. 137, 69) had a net worth invested in the business of over $15,000—that much more than sufficient to have paid Swoffords and every other creditor in full—so there was neither motive nor necessity for Swoffords to attempt an unfair advantage of other creditors. And, indeed, the contract entered into gives them no unfair advantage. Unlike the ordinary mortgage on merchandise, the contract constitutes no lien upon a general stock; nothing is covered by it except the identical goods bought from Swoffords. Nothing is contained in the contract whereby goods might be sold and the stock replenished with a lien remaining on the old and attaching to the new; nothing in the way of permission to Newtons to convert the proceeds to their own use. No benefits accrue to Newtons, either direct or indirect, except in the application of all the proceeds of sale, when realized upon, including profits, to payment of the purchase price. Their hope lay entirely in the future—in the goods that should remain on hand when the debt was fully paid.

In all these respects the contract here under consideration is wholly unlike and sharply distinguishable from the mortgage discussed in *Robinson* v. *Elliott, 22* Wall, 513, so largely quoted from, and the other cases cited by the learned district judge in the opinion filed by him in the court below, and in appellant's brief filed here. These cases are also clearly distinguishable from the case at bar, in that there the attack on the instrument was made and the question of illegality raised by creditors, subsequent mortgagees or purchasers in good faith, while here the attacking party, the trustee, merely stands in the shoes of the vendee. And this same distinction will be found to exist in every authority cited in this court in behalf of the trustee. For this reason we shall not quarrel with the authorities cited by appellant. They simply discuss the rights of purchasers, subsequent mortgagors or creditors armed with process, and have no application to the issues in this case where none of such parties appear.

A VALID CONTRACT IN ARKANSAS.

Such an instrument as the one between Swoffords and Newtons has not only been construed to be a contract of conditional sale in Arkansas, but it has been held legal and binding by the Supreme Court of that state in *Triplett* v. *Mansur* & *Tebbetts Impt. Co.,* 68 Ark., 230 (57 S. W., 261).

That was an action of replevin brought by Mansur & Tebbetts Impt. Co., of St. Louis, against C. H. Tripplett, as assignee of H. C. McGaughy, to recover certain merchandise sold by plaintiff to said McGaughy, for re-sale, under a contract containing an agreement as follows:

"And it is also agreed that the title to and ownership of all goods which may be shipped as herein provided, or during the

current season, shall remain in, and their proceeds, in case of sale, shall be the property of Mansur & Tebbetts Implement Co., and subject to their order, until full payment shall have been made for the same by the said McGaughy."

Construing this clause of the contract, the court, by Mr. Justice HUGHES, said:

"According to the contract of the parties, if the goods were sold by McGaughy, they were to be sold as the property of the appellee (the vendors) and the proceeds of the sale were to be and remain the property of the appellee. Such an agreement is valid. *New Haven Wire Co. Cases,* 57 Conn., 532 (18 Atl., 266, 5 L. R. A., 300); *Brewery Co.* v. *Merritt,* 82 Mich., 198 (46 N. W., 379, 9 L. R. A., 270); *Perkins* v. *Mettler,* 126 Cal., 100. The appellant concedes, and the law is, that when personal property is sold under an agreement that the title to the property shall not pass, but remain in the vendor until fully paid for, no act of the buyer can prevent a recovery of the property by the seller, if the same is not paid for. 'When a chattel is sold with reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed; and a purchaser from the vendee acquires no title, though he buys in good faith, for a valuable consideration, and without notice of the condition.' *McIntosh* v. *Hill,* 47 Ark., 363; *Simpson* v. *Shakelford,* 49 Ark., 63; *Distilling Co.* v. *Shannon,* 60 Ark., 133."

See also:

McRea v. *Merrifield,* 48 Ark., 160;
Carroll v. *Wiggins,* 30 Id., 402.

In the case above quoted from, the assignee insisted, as does the trustee in the case at bar, that where goods are sold to a merchant for the purpose of re-sale the doctrine of conditional sales could not be applied.

That decision ought to be sufficient in itself to satisfy the most critical as to the law of Arkansas regarding contracts like the one in controversy here and in that case discussed; but if any

doubt remains as to the validity of such contracts between the parties and their privies it must certainly be dispelled by reading the authorities there cited, and approved.

THE MICHIGAN CASE.

In the cited case of *Brewery Co.* v. *Merritt,* 82 Mich., 198, it was, by a written contract set out in the opinion, agreed that the Brewery Company should ship to Lentz Bros. all beer ordered by them at the price of $5.75 per barrel, and that the title to such beer should remain and rest in the Brewery Company until sold, but nothing was said as to what should be done with the proceeds of sales. At that time Michigan, like Arkansas at present, had no statute requiring conditional sale contracts to be recorded. A portion of the beer shipped under the contract was seized by the sheriff under an execution against Lentz, and replevin followed. The trial court held that under the contract the absolute title to the beer passed at once to Lentz Bros., and was subject to levy and sale under execution in favor of their creditors, saying:

"If the contract could be upheld it would simply put it in the power of Lentz Bros. to do an extensive business, apparently on their own account, thus giving them a false credit to which they were not entitled in dealing with others."

But this ruling was reversed by the Supreme Court and in the opinion written by Mr. Chief Justice CHAMPLIN, it was said:

"The Brewery Company has a right to say, 'We will fill your order for beer, which you may sell as you choose, but the title shall remain in us until you do sell.' * * * The effect of such contract was that the beer not sold remained the property of the company, and the firm owed them for all they had sold. * * * There is nothing illegal, immoral or corrupt in the contract."

In the case at bar, the learned district judge based his decision adverse to intervener on the ground that the bankrupts were not required to pay over the proceeds of sales to apply upon the indebtedness, although in so doing he wholly overlooked the plain provisions of the contract (Par. 3) that the title to the proceeds of sale *"whether in cash, notes or book accounts, shall be vested and remain in Swofford Bros. Dry Goods Company* until the full purchase price shall be paid in cash." In the Michigan case cited and approved by the Supreme Court of Arkansas, no reference whatever was made in the contract regarding the proceeds derived from sales, and yet the court held the contract valid even as against a creditor armed with execution.

THE CALIFORNIA CASE.

But far stronger in upholding the contention of intervener, both as to the nature and validity of the contract under discussion herein, is *Perkins* v. *Mettler,* 126 Cal., 100; and the case is specially important and significant because it is also cited and approved by the Arkansas court in the decision above quoted from. By the contract there in controversy, the vendor sold a stock of merchandise for $3,792.82, $1,000 to be paid each year in quarterly installments, *and title was to remain in the vendor until the purchase price was fully paid.* But the vendees were given possession with privilege of selling same in regular course of business, and nothing was said as to what should be done with the proceeds. The stock, however, was to be replenished by the vendees at their own expense with new goods so as to keep its value substantially the same. The vendees went into possession and ran the business about eighteen months, when they voluntarily delivered the goods on hand to the vendor and assigned to him the book accounts that had accrued from credit

sales. Immediately thereafter involuntary proceedings in insolvency were commenced against the vendees, and a receiver was appointed, who brought an action against the vendor for the value of the property mentioned. On the trial before a jury, the court refused to give the following requested instruction:

"It is the province of the court to construe and interpret the contract in evidence and the court instructs you that said contract operated to vest the title to the property therein mentioned in Mealey & Co. (the vendees) notwithstanding any terms in said writing to the contrary. And the only interest that defendant had therein was one of lien or security for the indebtedness owing to him thereunder; and the court instructs you that such lien was what the law denominates a secret lien, and was fraudulent and void against the creditors of Mealey & Co. and also against their assignee in insolvency?"

An appeal was taken from the ruling of the trial court in refusing said requested instruction; but same was sustained by the Supreme Court in an opinion delivered by Mr. Justice GRAY, who said in part:

"It is conceded by appellant that the correctness or incorrectness of the court's ruling depends upon the interpretation of the contract. * * * His position is that the contract in question was an attempt to circumvent the chattel mortgage statute in the guise of a conditional sale reserving title in the vendor, and that it had the effect to convey to the vendees named in it the entire ownership of the property. The trial court must have been of the opinion, on the other hand, that the written agreement evidenced a conditional sale with the ownership of the property in the vendor until performance of the conditions. From a thorough consideration of the whole contract we are constrained to agree with the trial court. The intention of the parties, as disclosed by the whole contract, should govern the court in determining whether the sale was absolute or conditional. *Van Allen* v. *Francis,* 123 Cal., 474. It seems plainly apparent that if the contract is given the construction that the

parties to it intended it to receive, and that they gave to it themselves, it will be treated as a conditional sale."

If the same rule is followed in the case at bar, and the construction placed upon the contract that the parties themselves gave it, then it must also be treated as a conditional sale.

In *McRea* v. *Merrifield,* 48 Ark., 160, the Supreme Court of that state also cites, with approval, *Harkness* v. *Russell,* 118 U. S., 363, where Mr. Justice BRADLEY, after an exhaustive review of the authorities, squarely upholds our contention.

NO RECORDING LAW IN ARKANSAS.

In the State of Arkansas, there is no statute either requiring or permitting the filing or recording of conditional sale contracts.

> Conclusions of Law No. 1 (Rec. 200);
> *McRea* v. *Merrifield,* 48 Ark., 160;
> *McIntosh* v. *Hill,* 47 Id., 363, and cases cited, *supra;*
> *Simpson* v. *Shackelford,* 49 Id., 63-66.

And in the absence of such a statute there is neither necessity nor opportunity for recording. An unauthorized record of such a contract is not notice.

> 6 Am. & Eng. Ency. of Law (2nd Ed.), 498, and citations.

The absence of such a statute is an adequate and complete answer to the unfounded charge of secrecy made by the trustee in this case.

As a matter of fact, there is neither allegation nor proof that Newtons contracted a single dollar of indebtedness other than that to Swoffords, after the making of the reserve title contract.

A TRUSTEE IN BANKRUPTCY MERELY STANDS IN THE SHOES OF THE BANKRUPTS.

The underlying infirmity of the trustee's position, and of the opinion filed by the trial court in this case, is an erroneous conception of the status of a trustee in bankruptcy. Although the law regarding conditional sale contracts and chattel mortgages, and its effect upon the interests of the various parties in relation thereto, has long been settled in the several states, upon the enactment of the bankruptcy law it was believed by many that a trustee in bankruptcy was, in some manner, under that act, vested with a power and authority that placed him in a position equal or superior to that of a creditor armed with process, a subsequent mortgagee, or purchaser in good faith. That this view is still entertained by appellant is evidenced from the nature of the authorities cited.

However, the exact status of such trustee and the extreme limits of his power and authority, have been finally and forever settled and determined by this court in *York Mfg. Co.* v. *Cassell,* 201 U. S., 344, where it is held that:

"The trustee is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued."

The facts recited in that case are that the York Manufacturing Company sold to the Mount Vernon Ice Company certain machinery under a contract containing a provision that the title, ownership and right of possession to the machinery sold should remain in the vendor until the purchase price therefor should be fully paid in cash; but the contract was never filed for record. The Mount Vernon Ice Company went into possession of the property, and later were adjudicated bankrupt. Soon after the adjudication the York Manufacturing Company filed an inter-

vening petition, setting forth the conditional sale contract mentioned, alleging default in payment, and praying for an order permitting them to remove the machinery. This petition was resisted by other creditors, and by Cassell, the trustee. Mr. Justice PECKHAM delivered the opinion of the court, and said, in part:

"The question is simply whether the York Manufacturing Co. has a right, under its conditional sale of the machinery to the bankrupt corporation to take the machinery out of the premises where it was placed, as against all except judgment or other creditors having some specific lien. There are no judgment creditors in the case, and no attachment has been levied, and the question is simply whether the adjudication in bankruptcy is equivalent to a judgment or an attachment on the property, so as to prevent the York Manufacturing Company from asserting its right to remove the machinery by virtue of the reservation of title contained in its contract."

The court then holds that the state law governs and refers to the statutes of Ohio, and to the decisions of its Supreme Court in relation to conditional sale contracts and mortgages. It finds that, although not filed for record the contract was in Ohio (as it would be in Arkansas) valid as between the parties to it, and valid as against all persons who had not secured liens on the property by attachment, execution or otherwise. Proceeding then to discuss the status of the trustee, the court continues:

"We come then to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment, or other specific lien upon the machinery. The Circuit Court of Appeals has held herein that the seizure by the Court of Bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests on the bankrupt's estate. *We are of the opinion that it did not operate as a lien upon the machinery as against the York Manufacturing Company, the vendor thereof.* Under the provisions of the bankrupt act the trustee

in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. *The trustee,* under such circumstances, *stands simply in the shoes of the bankrupt, and as between them, he has no greater right than the bankrupt.* This is held in *Hewitt* v. *Berlin Mach. Works,* 194 U. S., 296, 48 L. Ed., 968, 24 Sup. Ct. Rep., 690. The same view was taken in *Thompson* v. *Fairbanks,* 196 U. S., 518, 49 L. Ed., 577, 55 Sup. Ct. Rep., 306. It was there stated that 'under the present bankrupt act, the trustee takes the property of the bankrupt in the same plight and condition that the bankrupt held it, and subject to all the equities impressed upon it in the hands of the bankrupt.' See *Yeatman* v. *New Orleans Sav. Inst.,* 95 U. S., 764, 24 L. Ed., 589; *Stewart* v. *Platt,* 101 U. S., 731, 25 L. Ed., 816; *Hauslet* v. *Harrison,* 105 U. S., 401, 26 L. Ed., 1075. The same doctrine was reaffirmed in *Humphrey* v. *Tatman,* 198 U. S., 91, 49 L. Ed., 956, Sup. Ct. Rep., 567. The law of Ohio says the conditional sale contract was good between the parties, although not filed. In such case the trustee in bankruptcy takes only the rights of the bankrupt, where there are no specific liens, as already stated. In this case, under the authorities already cited, the York Manufacturing Co. had the right, as between itself and the trustee in bankruptcy, to take the property under the unfiled contract with the bankrupt, and the adjudication in bankruptcy, did not operate as a lien upon the machinery in favor of the trustee."

And in the more recent case of *Warehousing Co.* v. *Hand,* 27 Sup. Ct. Rep., 720, the rule thus stated has been reaffirmed by this court.

What is said above regarding the law of Ohio is equally true of the law of Arkansas, for in that state, as we have shown by the decisions of its Supreme Court, in *Triplett* v. *Mansur* & *Tebbets Impt. Co.,* and other cases cited, *supra,* a conditional sale contract is good between the parties without recording. The

doctrine of *York Mfg. Co.* v. *Cassell* therefore applies with full force. Indeed, in the case at bar, the facts are even stronger in favor of intervener, for here the contract has been fully executed by the parties themselves, and possession delivered under its terms before bankruptcy ensued.

In justice to the trial court, we desire to say that, although previously rendered, the opinion in York Mfg. Co. v. Cassell, supra, had not been published at the time this case was decided, and the court's attention was not called thereto.

THE CONTRACT CONSIDERED AS A MORTGAGE.

But if we are to blind ourselves to the terms of the instrument itself, and to all the facts and circumstances surrounding its execution, which, as we have seen, so plainly stamp it as a contract of conditional sale, and if we regard it merely as a mortgage, it will be found that the Court of Appeals is correct in its conclusions, and intervenor must recover. For, in Arkansas, an unrecorded mortgage is valid as between the parties.

It is true that Arkansas has a statute regarding the filing or recording of mortgages, but it will be seen that such statute, under the construction given it by the courts of that state, has no application whatever to the facts of this case. Swoffords, if "mortgagees" at all, were "mortgagees" for a present consideration and the mortgage was executed by solvent parties. It was not therefore, voidable, as a preference, even if given within four months. Not only this, but there are no *subsequent mortgagees, no creditors armed with attachment, execution or other process;* and three days before the commencement of any bankruptcy proceedings, Newtons had voluntarily delivered to Swoffords the merchandise remaining unsold, and had, under the terms of the so-called "mortgage" turned over to them the

notes and accounts in controversy as being the proceeds derived from the sale of goods disposed of.

In other words, the receiver, and the trustee, as his successor, stepped into the shoes of the bankrupts after a full and voluntary compliance on their part with the terms of the "mortgage" after default, and before bankruptcy and it only requires a limited reference to the Arkansas authorities to determine the rights of the parties.

"A chattel mortgage, though not filed for record, is a valid security between the parties; and when, by virtue of it, the mortgagee takes possession of the mortgaged property, his title is good against a creditor of the mortgagor who subsequently attaches the property in his possession."

Applewhite v. *Harrell Milling Co.*, 49 Ark., 279;

Citing with approval:

Jones Chat. Mort., Sec. 178;
Frank v. *Miner*, 50 Ill., 444;
Hauselt v. *Harrison, Assign. in Bkcy.*, 105 U. S., 401;
Petring v. *Herr Dry Goods Co.*, 90 Mo., 649.

"A mortgage which has not been acknowledged nor recorded as required by the statute is, nevertheless, good as between the parties; and upon breach of the condition of payment, may be enforced against the mortgagee, and, on his death, against his administrator, in preference to his general creditors."

Haskell v. *Sevier*, 25 Ark., 152;
Main v. *Alexander*, 9 Id., 112.

"Under the laws of Arkansas, if a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title is good against everybody, if it was previously valid as between the parties, although the instrument is not acknowledged and recorded. The delivery cures all such defects."

Garner v. *Wright*, 52 Ark., 385;

Citing with approval:

Jones Chat. Mort., Sec. 178, and cases cited;
Applewhite v. *Milling Co.*, 49 Ark., 279;
Cameron v. *Marvin*, 26 Kan., 625;
Hutton v. *Arnett*, 51 Ill., 198.

"Before other creditors of a mortgagor can take advantage of an unacknowledged and unrecorded mortgage, they must be armed with process."

Martin v. *Ogden*, 41 Ark., 186;
Ringo v. *Wing*, 49 Id., 457;
Haskill v. *Sevier*, 25 Id., 152.

Thus, under the law of Arkansas, the right of Swoffords to the property in their possession at the time of the institution of bankruptcy proceedings was perfect, and must be so declared, unless the bankruptcy law fixes a different rule—unless, under its provisions, the trustee in bankruptcy stands in a better position than the bankrupts and their general creditors. But, as we have already seen, that question has been thoroughly discussed and permanently settled in favor of the intervenor by the Supreme Court of the United States in *York Mfg. Co.* v. *Cassell*, 201 U. S., 344, from which we have already quoted at length, and in *Thompson* v. *Fairbanks*, 196 U. S., 516, *Humphrey* v. *Tatman*, 198 U. S., 91, and other cases before cited. In the cases last named, it is not only held that the trustees stands squarely in the shoes of the bankrupts, *but that the delivery of possession relates back* to the date of the instrument itself.

Whatever may be the rule in Arkansas regarding the validity of the instrument of July 20th, 1904, as between the vendor and subsequent mortgagee or creditors armed with attachment or execution, it is very clear from the Arkansas decisions cited, that whether the instrument be considered either as a contract of conditional sale or as a mortgage resting as it did upon a

new and present consideration, it is good as between the parties thereto, and since the trustee occupies the same and no better position than the bankrupts themselves, the contract is good as against him, and the Court of Appeals is correct in its opinion and judgment.

III.

CONFUSION OF GOODS—ESTOPPEL.

Appellant seems to believe that some advantage should accrue to him from the finding of the Court of Appeals that the goods surrendered to Swoffords by Newtons "*were, with slight exception,* goods that had been delivered under the contract."

Swoffords made an effort in good faith to procure a return of its goods, and of its goods alone. If they did not succeed in so doing the fault lies wholly with Newtons, and, therefore, they cannot be heard to complain. For if, under the methods pursued by them, such confusion occurred, either as to the goods or as to the notes and accounts, that an exact separation could not be made, Swoffords were entitled to take all.

"If a mortgagor so confuses the mortgaged goods with his own that they cannot be distinguished, and refuses to separate them, the mortgagee may take all such goods. * * * When new goods have been added to a mortgaged stock, it is the duty of the mortgagor to identify the latter upon the mortgagee's taking possession. Although there be no such confusion of goods as to absolutely destroy their separate identity, yet, if they cannot be separated without the mortgagor's aid, the same mischief would be produced as that which follows a confusion of goods. If the mortgagor refuse to point out the mortgaged goods so as to enable the mortgagee to select them from others with which the mortgagor has mixed them, the latter cannot complain if the mortgagee seize the whole. Neither can other

creditors of the mortgagor complain of such seizure if it be made before they have acquired definite rights by attachment or levy."

Jones, Chat. Mort., Secs. 481, 482, and cases cited.

Neither can the trustee complain, for he stands merely in the shoes of the bankrupts—the mortgagors—and is bound and estopped by their acts.

York Mfg. Co. v. *Cassell, supra.*

IV.

THE ANSWER OF APPELLANT IS INSUFFICIENT.

While we entertain no doubt of the result in this case with a hearing based entirely upon the original contract of conditional sale, the stipulation and the findings of fact, at the same time we insist that, regardless of all these, judgment must be for intervenor, for the reason that the several answers filed herein by appellant do not state facts sufficient to allow him to recover.

For the orderly conduct of proceedings of this kind, and that the opposing parties may be duly advised of the claims and charges they are expected to meet with proper evidence, pleadings are required and are essential the same as in any other action; and the parties should be held to as strict a compliance with the rules of pleading as in other litigation.

At the opening of the trustee's defense before the master, we objected to the introduction of any evidence in his behalf on the ground that his answer (Rec. 182) did not state facts sufficient to constitute any defense to intervenor's petition. The objection was overruled, and one of the exceptions filed by intervenor to the master's report was based on that ruling. (Rec. 155.) But in deciding the case the District Court ignored our exceptions, as well as the master's report. We again raised the

question in the assignment of errors filed in the Court of Appeals (Rec. 163) but are still without a decision thereon. Nevertheless, we still believe our objection to have been well taken.

In the stipulation entered into between Swoffords and the court it was expressly agreed that the rights of the former should not be in any way prejudiced thereby, but should remain precisely the same as though it still held actual possession of the property. The position of the trustee is therefore the same as though he were the attacking party, and had brought an independent action to recover the property or its value, and his pleading must contain the same essential allegations.

Even if it were true that the property in controversy had been transferred by Newtons to Swoffords three days before bankruptcy, solely in payment of indebtedness, and without any previous contract relating thereto, the only right of the trustee would be to attack the transaction and to recover the property in controversy from Swoffords, by virtue of Sec. 60 of the bankruptcy act. That is to say, the trustee must allege and prove that the transaction constitutes a "preference" to Swoffords within the meaning of that section.

And before the trustee may recover he must allege and prove: (1) That Newtons were insolvent at the time they delivered the property to Swoffords; (2) that Newtons had creditors, other than Swoffords, of the same class; (3) that the intention of Newtons, and the effect of the delivery of said property was to enable Swoffords to obtain a greater percentage of its debt than other creditors of the same class; (4) that Swoffords knew of the insolvency of Newtons and had reasonable cause to believe that preference to it was intended.

Bankruptcy Act, Secs. 60a, 60b;
Baden v. *Bertenshaw, Trustee,* 68 Kan., 32;

Whitson v. *Farber Bank,* 105 Mo. App., 605;
Edwards v. *Carondolet Milling Co.,* 108 Mo. App., 275;
Swartz v. *Siegel-Hillman D. G. Co.,* 183 Mo., 438;
Pirie v. *Trust Co.,* 182 U. S., 438;
In re Eggert (C. C. A.), 102 Fed., 735.

In neither the original (Rec. 178), the amended (Rec. 179), nor the "amended and substituted answer" of the trustee (Rec. 185), is there a single one of the several allegations required. It is nowhere alleged that Newtons were or ever had been insolvent; it is nowhere alleged that the transfer was intended as a preference; nor that by reason thereof Swoffords would receive a larger percentage of its debt than other creditors of the same class. Indeed, *there is no allegation that there was ever any other creditor of any class.*

In some way the attorneys for appellant seem to have entertained the idea that the involuntary petition of the bankrupts on file, with the several schedules thereto attached, sufficiently established the insolvency of the Newtons and the existence of other creditors, and wholly obviated the necessity of allegations and proof in that respect. But far from filling the office of allegations in a petition filed by the trustee to recover alleged preferences, the schedules attached to the bankrupt's petition are not even evidence. So far as this case is concerned they are merely subsequent self-serving declarations of the bankrupt, made *ex parte* and without even an opportunity for cross examination.

1 Greenleaf on Evidence (13th Ed.), Sec. 178.

And no more does the order of adjudication constitute either an allegation or proof of insolvency. True, Newtons filed their voluntary petition for bankruptcy and were adjudi-

cated bankrupts only three days after delivery of the property had been made by them to Swoffords under the contract. But insolvency is not a condition precedent to the filing of a voluntary petition.

"Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."

Bankruptcy Act, Sec. 4a.

Even if the petition and order of adjudication could be considered evidence of insolvency at the date made, it would not establish insolvency at any other time, nor render unnecessary the allegations required by the statute as a basis for action on the part of the trustee. The judgment of a court must be grounded upon allegations and proof, and not upon mere speculations. In *Swartz* v. *Frank,* 183 Mo., 438, where an adjudication of bankruptcy had been made upon an involuntary petition, the court was asked by the trustee, in an action to recover an alleged preference, to presume a condition of insolvency only seven days previous; but the court very properly refused so to do, saying (syllabus 4):

"The general rule of law that a state of facts once shown to exist is ordinarily presumed to continue so until the contrary is shown, is not retrospective. Because a company is shown to be insolvent at the time its property was sold by the trustee, it does not follow that it was insolvent seven days before the bankruptcy proceedings were begun, when it made the payment which it is charged was a preference."

See also:

Lawson on Presumptive Evidence, 238;
Jarvis v. *Vandeford,* 116 N. C., 147;
Martyn v. *Curtis,* 67 Vt., 263.

Before any person may attack the disposition of his property by a debtor, actual insolvency must be alleged. And this

is equally true whether the moving party is proceeding under the bankruptcy act or at common law.

That the rights and interests of intervenor have suffered from these erroneous ideas of pleading on the part of the trustee, is evidenced by some of the findings made herein by the court of appeals. For instance, the statements made in finding number five to the effect that at a time when Newtons were insolvent, and Swoffords knew it, the property was surrendered, etc., are findings not warranted by the pleadings, and concerning which there never has been any issues joined or tried. And there are others of a similar nature.

* * * * * * *

Under the laws of Arkansas, as we have shown by the decisions of the highest court of that state, the contract of July 20th, 1904, is valid, and binding between the parties, and valid as well against the trustee. And this is true whether the instrument be construed as a contract of conditional sale or as a mortgage. The stipulation, entered into between Swoffords and the court, without any fraud or deceit on the part of Swoffords, definitely identifies the property in controversy with the contract. The trustee's retention of the property obtained by the receiver under the stipulation is such a ratification of the instrument that it can neither be repudiated nor disputed by him. The decree of the Court of Appeals is, therefore, correct, and should be affirmed by this court.

Respectfully submitted,

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February 10, 1909.

BRYANT, TRUSTEE OF NEWTON & CO., BANKRUPTS, *v.* SWOFFORD BROS. DRY GOODS CO.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 172. Argued April 22, 23, 1909.—Decided May 24, 1909.

In this case, *held*, that the sale of a stock of dry goods under a contract by which the articles sold remained the property of the vendor until paid for, with provision for substitution of other goods and that proceeds of goods sold also belonged to the vendor, was a conditional sale.

The validity of conditional sales depends upon the law of the State where made, and in bankruptcy the construction and validity of such a contract must be determined by the local law of the State, *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344, and the contract in this case as tested by the law of Arkansas is a conditional sale and is valid without record.

The trustee has no higher rights in regard to property sold to the bankrupt under conditional sale than the bankrupt had, and in this case *held* that the vendor was entitled to the goods unsold and the identified proceeds of those which had been sold.

Where the vendor of goods, sold to the bankrupt under conditional

sale, has taken possession, before the receiver is appointed, of the unsold goods and proceeds of those sold, but surrenders the same to the receiver under an arrangement approved by the referee, providing for the administration of the estate by the receiver, and that the ultimate disposition of the goods and proceeds surrendered shall be determined by the court, the trustee subsequently appointed is bound by the agreement and cannot question whether any of the property surrendered thereunder passed under the conditional sale.

THE record in this appeal, transmitted to this court from the Circuit Court of Appeals, contains the following findings of fact and conclusions of law:

"1. On July 20, 1904, Ernest M. Newton and John F. Newton, partners as E. M. Newton & Co., merchants at wholesale and retail in Arkansas, and Swofford Bros. Dry Goods Co., a corporation, of Kansas City, Missouri, engaged in the wholesale dry goods business, entered into a written contract as follows:

" 'Know all men by these presents: That Mr. E. M. Newton & Co., of New Lewisville, Lafayette County, Arkansas, a copartnership composed of E. M. Newton and J. F. Newton, party of the first part, has this day purchased from Swofford Bros. Dry Goods Co. and said Swofford Bros. Dry Goods Co., party of the second part, has sold to said E. M. Newton & Co. certain goods upon the following expressed conditions:

" '1. Said goods shall be selected by said first party from sample or from stock of said second party at Kansas City, Missouri, and same shall be shipped to said first party upon their request to New Lewisville, Arkansas, from which place they shall not be removed without the written consent of said second party, save and except that said first party shall have the right to sell said goods in the ordinary course of business, but not otherwise.

" '2. Said second party shall prepare at time of shipment full and complete invoices of the goods so sold and selected and shall deliver copies of said invoices by mail or otherwise to said first party. Such invoices shall consist of itemized list of the

articles so sold and shipped with the price and value of each article, and shall show also the credit terms upon which the same are sold and the rate of discount, if any, which is to be allowed upon payment of the purchase price in cash upon delivery or at an earlier date than that specified in said credit terms.

" '3. The title to and right to immediate possession of all the goods so sold and shipped by said Swofford Bros. Dry Goods Co. and of the proceeds derived from the sale of the same by the first party, whether in cash or note or book account, shall be vested and remain in said Swofford Bros. Dry Goods Co. until the full purchase price and the agreed value of the same shall be paid by said E. M. Newton & Co. to said Swofford Bros. Dry Goods Co. in cash; and any and all notes, checks and accepted drafts shall not be considered as payment, but merely as evidence of indebtedness. And upon taking possession of any notes and book accounts derived by said first party from the sale of said goods or any part thereof, said Swofford Bros. Dry Goods Co. shall have the right to collect the same either in its name or in the name of E. M. Newton & Co. by suit or otherwise and in case of disputed notes and accounts against persons of doubtful solvency, said second party may compromise and settle the same or may extend the time of payment thereof in such manner and upon such terms as may to it seem advantageous, and any new notes taken thereafter, whether in the name of Mr. E. M. Newton & Co., or in the name of said Swofford Bros. Dry Goods Co., shall be held and considered in all respects the same as the original evidence of indebtedness.

" '4. This contract and the terms thereof shall apply to all future orders given by the E. M. Newton & Co., and to all future sales and shipments made to them by said Swofford Bros. Dry Goods Co., so long as any part or portion of the purchase price of the goods sold and delivered hereunder shall remain unpaid, said Swofford Bros. Dry Goods Co. shall have the right to terminate this contract at any time, and said E. M. Newton & Co. may terminate the same at any time by paying

in full in cash whatever balance of the purchase price of the goods purchased and shipped shall then remain unpaid. Delivery of the goods properly packed and marked to a common carrier at Kansas City, Mo., consigned to the first party as above specified shall be deemed and considered a full and complete delivery thereof by said second party and all freight and transportation charges shall be paid by said consignees. The acceptance of goods subsequently sold and shipped by the first party and the placing of the same in their stores and warehouses at New Lewisville, Ark., or elsewhere, shall be held and considered sufficient to bring such goods within and under the terms hereof, shall be mentioned or referred to in the order so given or in the invoices given and delivered with each invoice.

"'Said first party shall keep all goods purchased hereunder properly insured at their expense for the benefit of second party; but the loss or destruction of such goods by fire or otherwise shall not cancel the indebtedness thereof, but said first party shall still remain liable to second party for any part of the purchase price remaining unpaid.

"'In witness whereof the parties above named have hereunto placed their hands and seals in duplicate this 20th day of July, 1905.

"'E. M. NEWTON & Co.,

"'SWOFFORD BROS. DRY GOODS CO.,

"'Signed by WM. MOORE, *Sec.*'

"2. The contract was not filed or recorded.

"3. Pursuant to the contract and prior to June 30, 1905, the Dry Goods Company delivered to the Newtons goods of the value of $15,369.57. The latter paid on account thereof the sum of $2,059.01. On June 30, 1905, the unpaid balance was $13,310.56.

"4. The goods delivered under the contract were placed by the Newtons in their stock with other goods obtained from other parties, but they were of such character and contained such marks as rendered them capable of being identified and

separated. It was contemplated by the parties that the Newtons might sell the goods so delivered in the usual course of their business. The Newtons did not keep separate accounts of their resales of the goods nor did the Dry Goods Company require them to make reports thereof.

"5. On June 30, 1905, when the Newtons were insolvent and the Dry Goods Company knew it, they surrendered to the Dry Goods Company as belonging to it under the provisions of the contract, goods of the value of $5,337.21; notes to the amount of $1,684.32, and customers' accounts to the amount of $8,277.04. The goods were so surrendered by the Newtons as being the unsold part of those delivered under the contract, and the notes and accounts as representing proceeds of their sales of like goods. Actual possession was taken by the Dry Goods Company.

"6. In fact the goods surrendered to the Dry Goods Company were, with slight exception, goods that had been delivered under the contract, but only about one-half in amount of the notes and accounts surrendered represented proceeds of other goods delivered under the contract.

"7. On July 3, 1905, three days after the surrender of the property as above mentioned, the Newtons filed their voluntary petition in bankruptcy, were adjudged bankrupts, and Thad. A. Bryant was appointed receiver. In one of the schedules attached to the verified petition in bankruptcy the Dry Goods Company was listed as a secured creditor, with a statement of the facts upon which its rights were based, and recitals of the surrender to it of the goods, notes and accounts, that the notes and accounts were proceeds of the goods furnished by the Dry Goods Company under the contract and resold by the Newtons to their customers, and that the goods, notes and accounts were then in the possession of that company.

"8. After the appointment of the receiver in the bankruptcy proceeding he demanded from the Dry Goods Company possession of the goods, notes and accounts mentioned. The

demand was refused, but afterwards the Dry Goods Company surrendered them to the receiver under a written stipulation that they might be disposed of by him in connection with the sale of the other property in his hands, but that the Dry Goods Company should not be prejudiced thereby, and that the proceeds should be held in lieu of the property so surrendered to abide the final determination of a court of competent jurisdiction as to the ownership thereof, and if the Dry Goods Company prevailed it should have the proceeds free of fees, charges and expenses. As one of the conditions upon which it was made it was expressly admitted in this stipulation that the goods, notes and accounts in controversy were then in the actual, exclusive and adverse possession of the Dry Goods Company, that the goods were part of those delivered to the Newtons under the contract of July 20, 1904, and that the notes and accounts were proceeds of other goods delivered under that contract. This stipulation was made subject to the approval of the referee in bankruptcy. It was executed by the Dry Goods Company and the receiver, and the referee duly endorsed his approval thereon. Upon the faith thereof the goods, notes and accounts were then surrendered to the receiver. No fraud or deception was practiced by the Dry Goods Company upon the referee or the receiver in connection with the making of this stipulation.

"9. Thad. A. Bryant who had been appointed receiver was duly selected as trustee. He sold the goods in controversy for $3,135.00. The notes and accounts were not sold but at the time of the hearing of this matter before the referee he had collected $2,250.00 on account thereof and still retained in his hands those that were uncollected. He has kept a separate account of these funds and held sufficient funds to answer the result of the litigation.

"10. The Dry Goods Company thereupon presented its intervening petition seeking the payment to it of the sums realized as mentioned in the preceding finding and the restitution to it of the uncollected notes and accounts. The controversy

in the cause was presented by the intervening petition, the trustee's answer thereto and the reply of the Dry Goods Company.

"*Conclusions of Law.*

"1. The contract of July 20, 1904, is a contract of conditional sale and not of mortgage, and as such was not required by the laws of Arkansas to be filed or recorded.

"2. Under the laws of Arkansas the contract was valid as between the parties thereto, notwithstanding the fact that it authorized the vendees to resell the goods delivered thereunder.

"3. It was also valid as between the parties thereto not only in respect of such of the goods delivered thereunder as remained unsold when the vendor demanded and secured possession from the vendees, but also in respect of the notes and accounts which represented proceeds of like goods resold by the vendee to their customers and which could be so identified and segregated.

"4. The contract being valid under the local law as between the parties thereto the trustee in bankruptcy of the vendee cannot avoid or defeat the title of the vendor who took possession prior to the institution of the proceedings in which the vendees were adjudged to be bankrupts. The trustee has no greater right or title than the bankrupts.

"5. Inasmuch as the bankruptcy court obtained from the vendor possession of the notes and accounts in controversy upon the faith of a stipulation made with its approval and without practice of fraud or deceit that such notes and accounts were the proceeds of goods covered by the contract of conditional sale, and still holds to such possession, the trustee is estopped from disputing the fact stipulated.

"6. Swofford Bros. Dry Goods Company, the vendor, is entitled to a decree that the trustee in bankruptcy pay to it the sum of $3,135.00, the proceeds of the goods in controversy, and the further sum of $2,250.00, the collections of notes and accounts in controversy made by the trustee prior to the hearing

before the referee, and also for such collections as may have been made since that time and for the surrender of such of said notes and accounts as may remain uncollected and for costs. The sums mentioned should be paid in full."

Mr. William H. Arnold, with whom *Mr. James K. Jones* was on the brief, for appellant:

The receiver did not have authority to make the admission, so that it might not be questioned by the trustee, contained in the agreement of July 4, 1905, that the notes and accounts turned over to the intervenor were proceeds of sales of goods purchased from Swofford Bros. Dry Goods Co.

While the receiver undoubtedly had the right and it was his duty to take charge of the bankrupt estate, he did not have authority, under the statute creating his office, to enter into any kind of an agreement which would in any manner affect, or give over to, a claimant the property of the bankrupt estate. The trustee is primarily the representative of the creditors and not the receiver. The receiver is non-partisan and he acts as an agent for the court in protecting the property against loss. *Booth* v. *Clark*, 17 How. 322.

By § 70 of the Bankrupt Act the title of the bankrupt's property is vested in the trustee. If the title of Newton & Company to these notes, accounts and goods, to which the intervenor could not make claim, vested in the trustee, then it would seem that the receiver would be without power to make any contract whereby that title could be divested. In this case the stipulation, however, has been sustained by the Honorable Circuit Court of Appeals, and the direct effect of it was to divest the title of property from the trustee which it was intended by the Bankrupt Act should pass to him.

But the trustee has not in himself the right of unlimited disposition of the property of the bankrupt. He cannot compromise or arbitrate a controversy, except in a certain way prescribed by the statute and by the general orders in bankruptcy. Certainly the receiver, who has not as much power

as the trustee, should not, therefore, be allowed to make contracts or deals without any restriction whatever, whereby the property which belongs to the creditors would be wasted or given away. *Wallace* v. *Loomis*, 97 U. S. 146; *Ray* v. *Norsworthy*, 23 Wall. 128; *White* v. *Schloerb*, 178 U. S. 542.

The contract of July 20, 1904, was a mortgage or secret lien which was fraudulent as to creditors of Newton & Company. *Herryford* v. *Davis*, 102 U. S. 235.

There are a number of decisions of the Supreme Court of Arkansas sustaining contracts wherein it is stipulated that the title of the property is to remain in the vendor until the price is paid, but these decisions are with reference to such things as machinery, farming implements, live stock, and where it is not agreed that the property shall be resold. *Gibson* v. *Martin*, 38 Arkansas, 207; *McIntosh & Beam* v. *Hill*, 47 Arkansas, 363; *Carroll* v. *Wiggins*, 30 Arkansas, 402; *Simpson* v. *Shackerford*, 49 Arkansas, 63; *McRea* v. *Merrifield*, 48 Arkansas, 160; *Cincinnati Safe Co.* v. *Kelly*, 54 Arkansas, 476; *Edgewood Distilling Co.* v. *Shannon*, 60 Arkansas, 133; *Dedman* v. *Earle*, 52 Arkansas, 164; *Ferguson* v. *Hetherington*, 39 Arkansas, 438; *Ames Iron Works* v. *Rea*, 56 Arkansas, 450; *Morris* v. *Cohn*, 55 Arkansas, 401; *Bank of Little Rock* v. *Collins*, 66 Arkansas, 240; *Faisst* v. *Waldo*, 57 Arkansas, 270.

The doctrine of these cases follow the decisions of the Supreme Court of the United States. *Sturm* v. *Boker*, 150 U. S. 312.

There is an obvious difference in reserving the title to implements, wagons, grist-mills, tools, etc., under such contracts, and gents' furnishing goods or general merchandise, where there can be no question of the identity of the wagons, machinery, etc., but there would always be a question with reference to the identity of general merchandise. The very nature of the goods themselves, added to the power of disposition as in the case at bar, without being required to keep them separate from other goods or the proceeds separate from the general stock, ought to bar a recovery in this case.

This difference is recognized by the Supreme Court of Arkansas. *Lund* v. *Fletcher*, 39 Arkansas, 334. See also *Robinson* v. *Elliott*, 2 Wall. 513; *Means* v. *Dowd*, 128 U. S. 273; *Blennerhassett* v. *Sherman*, 105 U. S. 100.

The decisions of the Supreme Court of Arkansas, under practically the same conditions as in the case at bar, show that the intervenors' contract is fraudulent in law and cannot be sustained. *Lund* v. *Fletcher*, 39 Arkansas, 335; *Martin* v. *Ogden*, 41 Arkansas, 192; *Fink* v. *Ehrman Bros.*, 44 Arkansas, 310.

The case of *Triplett* v. *Mansur & Tebbetts Implement Co.*, 68 Arkansas, 230, cited in opinion of Circuit Court of Appeals, has no application to this controversy.

Mr. Ernest S. Ellis, with whom *Mr. Edgar C. Ellis* was on the brief, for appellee:

The stipulation entered into between the Swoffords and the receiver, under the supervision and with the approval of the referee, by virtue of which the Swoffords surrendered possession of the property in controversy to the court, and under which it was later sold by the trustee who now holds the proceeds, is valid and binding on the parties to this action, and cannot be repudiated nor ignored by the trustee. The acceptance and retention of benefits thereunder by the trustee operates as a ratification of same on his part, and as a waiver of any lack of authority or irregularities in its execution. *Bryan* v. *Bernheimer*, 181 U. S. 188.

Under said stipulation the facts as to whether all of the goods returned by the Newtons to the Swoffords were actually bought from them, and as to whether the notes and accounts assigned by the Newtons to the Swoffords represented exclusively proceeds derived from a sale of their goods, has been settled and agreed upon, and are not questions to be litigated in this action. Judgment in relation thereto must, therefore, be made upon the basis of said stipulation.

The written instrument of July 20, 1904, executed by the

Swoffords and the Newtons, and under which the property in controversy was sold by the Swoffords and later returned to it by the Newtons, is a contract of conditional sale; and there is no law in Arkansas which either requires or permits it to be filed or recorded. It is valid between the parties, and valid, also, against the trustee in bankruptcy, who stands merely in the shoes of the bankrupts, and is in no sense a creditor armed with process, a subsequent mortgagee or a purchaser in good faith. *Triplett* v. *Mansur & Tebbetts Impt. Co.*, 68 Arkansas, 230 (57 S. W. Rep. 261), and cases cited.

Mr. Justice Moody, after making the foregoing statement, delivered the opinion of the court.

The merchandise which was delivered by Swofford Bros. Dry Goods Co. to E. M. Newton & Co. was delivered under the terms of a written contract. That contract provided that the title to the goods until their sale, and to the proceeds derived from their sale, whether in the form of cash, notes or book accounts, should be and remain in the Dry Goods Company. The contract gave the Newtons the right to sell the goods in the ordinary course of business, but, as has been said, provided that the proceeds of the sale, in whatever form they existed, should be the property of the Dry Goods Company. When the Newtons became insolvent and ceased business they, in recognition of the obligations due from them under this contract, returned to the Dry Goods Company that part of their goods which remained unsold. The character and marks of the goods rendered them capable of being identified and separated. They turned over at the same time, as and for the notes and accounts representing the proceeds of sales of the company's goods, certain notes and customers' accounts. It was found as a fact that one-half in amount of these notes and accounts represented the proceeds of sales of other goods than those delivered under the contract. It, therefore, now appears, if it is competent to show it, that this one-half of the

notes and accounts did not belong to the Dry Goods Company, and ought not to have been turned over to it, and that, on the contrary, they should have gone into the estate of the Newtons, who subsequently became bankrupt. Three days after the surrender of this property the Newtons, on their voluntary petition, were adjudged bankrupts and the appellant was appointed receiver. He demanded of the Dry Goods Company the possession of the goods, notes and accounts mentioned, but the demand was refused. Subsequently a written contract was entered into between the Dry Goods Company and the receiver, with the approval of the referee. No fraud or deceit induced the making of this contract. By its terms the Dry Goods Company, on its part, surrendered the goods, notes and accounts to the receiver, and agreed that he might dispose of them in connection with the assets of the estate, and that the proceeds of the property thus disposed of should be held in lieu of it to abide the determination of a court of competent jurisdiction. The receiver, on the other hand, agreed that the goods, notes and accounts were in the actual and adverse possession of the Dry Goods Company, and that the goods were part of those delivered to the Newtons under the contract between them and the Dry Goods Company before referred to, and that the notes and accounts were the proceeds of other goods delivered under that contract. Subsequently, the receiver was appointed trustee and sold the goods and collected a part of the notes and accounts. The proceeds of the goods, and of the collections are held to await the result of this litigation, which is in the form of an intervening petition of the Dry Goods Company.

We think it clear that the contract under which the goods were delivered to the Newtons was one of conditional sale. *Harkness* v. *Russell*, 118 U. S. 663; *Wm. W. Bierce, Ltd.*, v. *Hutchins*, 205 U. S. 340. There is nothing in the nature of this contract which would forbid the parties from entering into it if it is valid by the laws of the State where made, but in bankruptcy the construction and validity of such a contract must be

determined by the local laws of the State. *Thompson* v. *Fairbanks*, 196 U. S. 516; *Humphrey* v. *Tatman*, 198 U. S. 91; *York Manufacturing Company* v. *Cassell*, 201 U. S. 344. That such a contract is a conditional sale and is valid without record is the law of Arkansas. *Triplett* v. *Mansur & Tebbetts Implement Co.*, 68 Arkansas, 230. The trustee has no higher rights in this regard than the bankrupt. *York Manufacturing Co.* v. *Cassell, supra.*

It follows that, so far as the identified goods and notes and accounts are concerned, the intervenor, the Dry Goods Company, must prevail.

It has turned out, according to the finding of facts, that some small fraction of the goods and about one-half of the notes and accounts which were delivered by the Newtons to the Dry Goods Company, as and for the goods, notes and accounts which were the property of that company, were not in fact such, and the question therefore arises whether, under the circumstances disclosed in the findings, the trustee is entitled to avail himself of these facts. We think it was rightly held by the court below that he was not. There seems to be no reason for a nice consideration of the powers of receivers and trustees. When the receiver was appointed he found all the property in dispute in the hands of the Dry Goods Company, to which it had been delivered by the Newtons, as and for the property of the company, and by which it had been received as its own property. When the receiver made his demand for it the return was at first refused. The parties in the controversy, then being at arm's length, agreed that if the Dry Goods Company would give up the advantages of possession and instead of converting the goods, notes and accounts into cash in its own way and on its own account, permit the receiver to do so, then those goods should be deemed part of those delivered under the contract and the notes and accounts the proceeds of other goods delivered under the contract. This arrangement was approved by the referee. The trustee has taken the property under it and has never offered to return the property, or

any part of it. The property has in large part been sold or otherwise disposed of in the course of the bankruptcy administration. Under these circumstances we are of opinion that the trustee, the appellant in this case, was bound by the agreement of the receiver, that all the property in dispute should be conclusively deemed that which passed under the original conditional contract or the proceeds thereof.

Judgment affirmed.